TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [illegible]

No. [illegible] 79

LEO SALOMON, JACQUES H. HECHT, ISIDORE M. KASTNER, ET AL., ETC., PLAINTIFFS IN ERROR,

vs.

STATE TAX COMMISSION OF NEW YORK

IN ERROR TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK

FILED [illegible]

(33,261)

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SUPREME COURT OF THE UNITED STATES

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No. 809

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IN ERROR TO THE SURROGATES' COURT OF NEW YORK COUNTY, STATE OF NEW YORK

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 23, 1928

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IN COURT OF APPEALS OF NEW YORK

In the Matter of the Transfer Tax Upon the Estate of Myer Hecht, Deceased; Leo Salomon et al., as Executors, Appellants; State Tax Commission of New York, Respondent

STATEMENT UNDER RULE 234

This case comes up for review by this Court, pursuant to the Order of Affirmance by the Appellate Division, First Department. The Order of Affirmance was entered on or about March 4, 1927; the Order on Remittitur was entered on or about March 30, 1927.

This proceeding was commenced by a petition filed by the Executors of decedent's estate to the Surrogates' Court of New York County to fix and assess a transfer tax upon the Estate of the deceased.

The matter was duly referred to M. F. Loughman, Esquire, Appraiser, before whom Charles A. Curtin, Esquire, appeared as attorney for the State Tax Commission and Ehrich & Mencher, as attorneys for the Executors.

Such proceedings were had that a report was made to the Surrogates' Court by said Appraiser, and upon said report a pro forma order was entered on the 11th day of November, 1925, fixing and assessing the tax upon the Estate of the decedent. From said order an appeal was taken to the Surrogates' Court of New York County, and upon said appeal an order was entered May 7, 1926, affirming said pro forma order. From said order of affirmance an appeal is taken to this Court.

There is no change of parties or attorneys.

[fol. 2] IN SURROGATES' COURT OF NEW YORK COUNTY

In the Matter of the Transfer Tax Upon the Estate of MYER HECHT, Deceased

NOTICE OF APPEAL TO APPELLATE DIVISION

GENTLEMEN: You will please take notice that the Executors of this decedent's estate and Pauline Hecht individ-

ually, hereby appeal to the Appellate Division of the Supreme Court of the State of New York for the First Department, from the order of the Surrogate of the County of New York heretofore made and entered herein on the 7th day of May, 1926, affirming the order theretofore made and entered on the 11th day of November, 1925, fixing and assessing a tax upon the transfers of the property of said decedent under the law relating to taxable transfers of property, and from each and every part thereof.

Dated the 1st day of June, 1926.

Ehrich & Mencher, Attorneys for Executors, 20 Broad Street, Manhattan, N. Y. City.

[fol. 3] In Surrogates' Court of New York County

Order of Surrogate Denying Appeal and Affirming Order Fixing Tax—May 7, 1926

An appeal having been taken to this Court by the executors in the above named estate from the pro forma order entered in the Surrogates' Court on the 11th day of November, 1925, and said appeal having come on to be heard, and after hearing Ehrich & Mencher, attorneys for the executors and Charles A. Curtin, attorney for the State Tax Commission, in opposition, it is hereby

Ordered and adjudged that the appeal be and the same is hereby denied and the pro forma order fixing tax is affirmed.

John P. O'Brien, Surrogate.

[fol. 4] In Surrogates' Court of New York County

Order Assessing Tax—November 11, 1925

On reading the report, filed the 6th day of November, 1925, of M. F. Loughman, Esq., the appraiser appointed by order of this Court dated the 5th day of June, 1925, and it appearing that the said decedent died on the 2nd day of April, 1925, it is

Ordered and adjudged that the cash value of the property referred to in said report, the transfer of which is subject to the tax imposed by the Act relating to taxable transfers, and the tax to which the transfers are liable are as follows:

Beneficiary, Miriam Hecht, sister; amount received, $5,000; amount of exemption, 0; taxable amount $5,000; tax assessed, $100.

Beneficiary, Hannah Hecht, sister; amount received, amount of exemption, 0; taxable amount, $5,000; tax assessed, $100.

Beneficiary, Rita Adele Salomon, granddaughter; amount received, $10,000; amount of exemption, 0; taxable amount, $10,000; tax assessed, $100.

[fol. 5] Beneficiary, John Leo Salomon, Grandson; amount received, $10,000; amount of exemption, 0; taxable amount, $10,000; tax assessed, $100.

Beneficiary, Paula Ann Kastner, grand-daughter; amount received, $10,000; amount of exemption, 0; taxable amount $10,000; tax assessed, $100.

Beneficiary, Leo Salomon, son-in-law; amount received, $10,000; amount of exemption, 0; taxable amount, $10,000; tax assessed, $200.

Beneficiary, Jeanette H. Kastner, daughter; amount received, $15,000; amount of exemption, $5,000; taxable amount, $10,000; tax assessed, $100.

Beneficiary, Jacques H. Hecht, son; amount received, $17,320; amount of exemption, $5,000; taxable amount, $12,320; tax assessed, $123.20.

Beneficiary, Pauline Hecht, widow; amount received, $124,957; amount of exemption, $5,000; taxable amount, $119,957; tax assessed, $2,348.71.

Beneficiary, Executors for 1% class; amount received, $322,094.37; amount of exemption, 0; taxable amount, $322,094.37; tax assessed, $9,633.77.

James A. Foley, Surrogate.

[fol. 6] In Surrogates' Court of New York County

Notice of Appeal to Surrogate from Order Assessing Tax

Sir: Please take notice that the executors of the above named decedent's estate, including Pauline Hecht, both as

an executrix and individually, are dissatisfied with the appraisal herein of the property of the said Myer Hecht, deceased, and hereby object to the report of M. F. Loughman, Transfer Tax Appraiser, filed herein on the 6th day of November, 1925, and to the order or decree made herein, fixing, assessing and determining the Transfer Tax in respect to the property of the said decedent, and entered herein on the 11th day of November, 1925, and hereby appeal to the Surrogate from said appraisal and said assessment and determination of said tax and from said order or decree.

The grounds upon which said appeal is taken are:

First. That the tax of $2,348.71 imposed upon the sum of $124,957 less an exemption of $5,000, stated in the order aforementioned as the fair market value of the amount received by Pauline Hecht, widow, is unlawful and illegal, [fol. 7] for the reason that the said sum of $124,957 is included in and the transfer thereof is taxed in and as a part of the sum of $322,094.37, stated to be the fair market value of the remainder interest taxed against the "Executors for persons of 1% class" mentioned as the last item on said taxing order, and if said sum of $124,957 is taxed separately and in addition to the full and undiminished value of the principal fund of the residue held in trust during the lifetime of Pauline Hecht, and the residue of $322,094.37 is thereafter taxed in full, it will result in the taxation of a larger estate than the fair market value of the net estate of decedent as determined by the appraisal to have been transferred by the Last Will and testament of the decedent, which said method of taxation as imposed by said order, is confiscatory, arbitrary and discriminatory and constitutes a taking of the property of the appellants and those whom they represent without due process of law and without just compensation, all in contravention and violation of the Federal and State Constitutions, and

Second. That the value of the transfer stated in said appraiser's report and in the order assessing tax to "Executors for 1% Class" at the sum of $322,094 is not the fair market value of the remainder after the life estate of the widow, Pauline Hecht, and that the tax assessed by said order in the sum of $9,633.77 on said remainder for persons in the 1% class is unlawful and illegal, in that the said

remainder value and the fair market value thereof is overvalued by the sum of $124,957 or more and the tax assessed [fol. 8] on said overvaluation is confiscatory, arbitrary, discriminatory and unlawful, and it constitutes the taking of property without due process of law and the taking of private property for a public use without just compensation, all in contravention and violation of the Federal and State Constitutions.

Third. That the erroneous and excessive taxation hereinbefore complained of in paragraphs marked "First" and "Second" of this appeal, contravenes and is in violation of Article 1, Section 6, of the Constitution of the State of New York and is contrary to and violates the 5th and 14th Amendments of the Constitution of the United States, in that the assessment of a tax as herein complained of constitutes a taking of the property of the appellant and those whom they represent for public use without just compensation and without due process of law, for the reason that, whereas, in and by the report of the Transfer Tax Appraiser on which the order assessing tax herein is based, the fair market value of decedent's entire net estate as of the date of decedent's date set forth in Paragraph "Third" of said report as having been transferred to the persons named in decedent's Will, is stated to be the sum of $405,414.37, the tax as assessed is assessed and fixed by the aforementioned order or decree on property of the value of $530,371.37, or the sum of $124,957 greater than the fair market value of the entire net estate which the appraiser reports that the above named decedent owned and was seized and possessed of at the time of his death.

And the executors herein and Pauline Hecht, individu- [fol. 9] ally, appeal from said order and from each and every part thereof.

Dated New York, December 21, 1925.

Ehrich & Meucher, Attorneys for Executors, No. 20 Broad Street, New York City.

To Charles A. Curtin, Attorney for State Comptroller; Martin G. McCue, Clerk of the Surrogates' Court of New York County.

IN SURROGATES' COURT OF NEW YORK COUNTY

In the Matter of the Appraisal under the Transfer Tax Law of the Estate of MYER HECHT, Deceased

APPRAISER'S REPORT

To the Surrogates' Court of the County of New York:

I, M. F. Loughman, Transfer Tax Appraiser, having been designed by Hon. James A. Foley, Surrogate of the [fol. 10] County of New York, by an order duly made and entered on the 5th day of June, 1925, to appraise the estate of the above-named decedent, pursuant to the provisions of the Law relating to taxable transfers of property, and the statutory notice my mail having been duly given herein to all the persons entitled thereto as provided in Section 230 of the Tax Law as appears by copy of such notice and affidavit of mailing thereof hereunto annexed, and having held an appraisal on the 4th day of November, 1925, at the Office of the Transfer Tax Appraiser for the County of New York, and having heard the allegations and proofs of the parties then and there appearing before me and offering the same, and having given due consideration to the affidavits and other papers submitted herein, and having made due and careful inquiry into all the matters and things brought before me in this proceeding, do now make and file the following report:

First. I report that the decedent herein died a resident of the State of New York on the 2nd day of April, 1925, leaving a Last Will and Testament, copy of which is hereunto annexed, which was duly admitted to probate by this Court on the — day of ——, 19—, and that thereafter on the 16th day of April, 1925, Letters Testamentary upon the estate of the said decedent were duly issued by this Court to Pauline Hecht, of 2372 Broadway, New York City, Leo Salomon, of Lynwood Ave., Cedarhurst, L. I., Jacques H. Hecht, of 2372 Broadway, Isidore M. Kastner, of 272 West 96th St., New York City, as Executors.

[fol. 11] Second. I further report the following appearances in this proceeding: Charles A. Curtin, Esq., Attorney for State Tax Commission, 220 West 40th Street, New

York City; Ehrich & Mencher, Esqs., Attorneys for Executors, 20 Broad Street, New York City.

Third. I further report that I found the property left by the decedent herein or in which said decedent had any beneficial interest or appointed or transferred in contemplation of death by decedent, to consist of the items set forth in the annexed affidavit for appraisal, and that the fair market value of each of the said items at the date of decedent's death is the amount set down by me opposite such item in the column designated "Value as appraised in this proceeding," and that the sums properly to be allowed as deductions herein for funeral expenses, expenses of administration, debts of decedent, etc., are the amounts set down by me after the several items claimed in the column designated "Allowed in this proceeding," as a result of which I find the said assets and deductions to be as shown in the following summary:

Assets

Schedule A—Real Estate	$.00
Schedule B—Cash	1,943.87
Schedule C—Personal Effects	372.00
Schedule D—Mortgages, Notes and Accounts	55,120.84
[fol. 12] Schedule E—Insurance	22,722.95
Schedule F—Stocks and Bonds	372,794.88
Schedule G—Partnerships or Business Interests	.00
Schedule H—Gifts and Transfers	.00
Schedule I—Powers of Appointment	.00
Schedule J—Interest in other estates	.00
Schedule K—Other property	.00
Gross assets	$452,954.54

Subject to Deductions as follows:

Schedule L—Funeral and Administration	$17,953.40	
Schedule M—Debts	2,488.70	
Schedule N—Other deductions	.00	
Commissions (3)	27,098.07	
Total deductions		47,540.17
The total of all property passing upon the death of the decedent, I appraise at		$405,414.37

Fourth. I further report all the beneficiaries entitled at the time of decedent's death to an interest in this estate pursuant to the provisions of Law, and of the said decedent's Last Will and Testament, the relationship of such persons to decedent, the amount of the share or interest of each, and whether such share or interest is taxable in this proceeding, to be as hereinafter set forth, all of said beneficiaries being of full age and sound mind except as otherwise designated.

Beneficiaries	Relationship	Amount of interest	Amount of exemption	Amount of interest taxable
[fol. 13]				
Mt. Sinai Hospital ..	(No relation.)			
Legacy ..		$500 00	$500 00	$ 00
Montefiore Home for Chronic Invalids	(No relation.)			
Legacy ..		500 00	500 00	00
Miriam Hecht	(Sister.)			
Legacy ..		5,000 00	00	5,000 00
Hannah Hecht ..	(Sister.)			
Legacy ..		5,000 00	00	5,000 00
Rita Adele Salomon	(Grand-daughter.)			
Legacy ..		10,000 00	00	10,000 00
John Leo Salomon	(Grand-son.)			
Legacy ..		10,000 00	00	10,000 00
Paula Ann Kastner	(Grand-daughter.)			
Legacy ..		10,000 00	00	10,000 00
Leo Salomon				
Legacy ..		10,000 00	00	10,000 00
Jeanette H. Kastner	(Daughter.)			
Legacy ..		15,000 00	5,000 00	10,000 00
Jacques H. Hecht ..	(Son.)			
Legacy ..		15,000 00		
Specific bequest		2,320 00		
		$17,320 00	5,000 00	12,320 00

Beneficiaries	Relationship	Amount of interest	Amount of exemption	Amount of interest taxable
Pauline Hecht	(Widow.)			
Life estate in residuary estate of $322,094.37.				
Present value		124,957 00	5,000 00	119,957 00
Executors for the benefit of a person of the 1% class Corpus		322,094 37	00	322,094 37

Respectfully submitted,

Dated at New York, N. Y., —— —, ——.

Appraiser: M. F. Loughman.

[fol. 14] In Surrogate's Court of New York County

In the Matter of an Application to Adjust the Transfer Tax upon the Estate of —— ——, Deceased

Order Designating Transfer Tax Appraiser—June 5, 1925

On reading and filing the petition of Leo Salomon, one of the executors of the estate of said decedent, I do hereby, pursuant to the requirement of Section 230 of Article X of the Tax Law, direct M. F. Loughman, Esq., one of the appraisers appointed by the State Tax Commission under said statute, to fix under Article X, Chapter 60 of the Consolidated Laws of 1909, and the acts amendatory thereof and supplemental thereto, the fair market value of the property which was of the above-named decedent, to declare the value of such interest or interests therein as may be subject to the payment of the transfer tax, to declare exempt from such tax such interest or interests as he may [fol. 15] find to be exempt, and to do such other thing or things in the premises as he may be authorized to do, by virtue of his office under the said provision of law.

James A. Foley, Surrogate.

Original filed June 5, 1925. Martin G. McCue, Clerk of the Surrogates' Court.

In Surrogates' Court of New York County

In the Matter of an Application to Adjust the Transfer Tax upon the Estate of Myer Hecht, Deceased

Petition of Leo Salomon for Designation of Transfer Tax Appraiser

To the Surrogates' Court of the County of New York:

The petition of Leo Salomon respectfully shows:

First. That your petitioner is one of the executors of the estate of —— ——, deceased, and as such is a person in- [fol. 16] terested in the estate of the said deceased.

Second. That the said decedent departed this life on the 2nd day of April, 1925, at New York City; that the said deceased was a resident of the City and County of New York.

Third. That letters testamentary on the estate of said deceased were, on the 16th day of April, 1925, issued to your petitioner by the Surrogates' Court of the County of New York, and that his post-office address is Lynwood Avenue, Cedarhust, L. I.

Fourth. That, as your petitioner is informed and believes, the transfer of the property of said decedent, or some portion thereof or some interest therein, is or may be subject to the payment of the tax imposed by the law in relation to taxable transfers of property.

Fifth. That all persons who are interested in said estate who are entitled to notice of all proceedings herein, and their post-office addresses, are as follows:

The State Tax Commission.

Pauline Hecht, 2372 Broadway, New York City.

Sophie H. Salomon, Lynwood Avenue, Cedarhurst, New York.

Jeanette H. Kastner, 272 West 90th Street, New York City.

Jacques H. Hecht, 2372 Broadway, New York City.

[fol. 17] Leo Salomon, Lynwood Ave., Cedarhurst, L. I., New York.

Isidor M. Kastner, 272 West 90th Street, New York City.

Mt. Sinai Hospital, 100th St. & Fifth Ave., New York City.

Montefiore Home for Chronic Invalids, Gun Hill Road and Bainbridge Ave., Bronx, New York.

Miriam Hecht, 1930 Grand Concourse, Bronx, New York.

Hannah Hecht, 1930 Grand Concourse, Bronx, New York.

Rita Adele Salomon, Lynwood Avenue, Cedarhurst, L. I.

John L. Salomon, Lynwood Avenue, Cedarhurst, L. I.

Paula Ann Kastner, 272 West 90th St., New York City.

That all the above-named are of full age and sound mind, except Rita Adele Salomon, Lynwood Avenue, Cedarhurst, L. I.; John L. Salomon, Lynwood Avenue, Cedarhurst, L. I.; Paula Ann Kastner, 272 West 90th St., New York City; George Kastner, 272 West 90th Street, New York

City, all residing with their respective parents, the said Rita Adele Salomon being over the age of fourteen years and all the others being under the age of fourteen years.

[fol. 18] That the gross value of the estate of the decedent, wherever situated, is more than $10,000.

That no previous application has been made for an order granting the relief prayed for in this petition.

That there are no persons, other than those herein mentioned, interested in this proceeding.

Wherefore, your petitioner prays that you will designate an appraiser, as provided by law, to fix, under Article X, Chapter 60 of the Consolidated Laws of 1909, and the Acts amendatory thereof and supplemental thereto, the fair market value of the property which was of the above-named decedent, to declare the value of such interest or interests therein as may be subject to the payment of the transfer tax, to declare exempt from such tax such interest or interests as he may find to be exempt, and to do such other thing or things in the premises as he may be authorized to do by virtue of his office under the said provision of law.

Dated New York, June 2nd, 1925.

Leo Salomon, Petitioner.

[fol. 19] *Duly sworn to by Leo Salomon. Jurat omitted in printing.*

[fol. 20] In Surrogates' Court of New York County

In the Matter of the Appraisal under the Transfer Tax Law of the Estate of Myer Hecht, Deceased

Affidavit and Schedules

State of New York,
County of New York, ss:

Leo Salomon, executor of the estate of the above-named decedent being duly sworn in this proceeding for the determination of the tax, if any, to be paid upon the assets of the said estate under the Law in Relation to Taxable Transfers of Property, deposes and says that as such administrator executor deponent is personally familiar with affairs of the said estate, the property constituting the assets

thereof, their fair market value, and the debts, expenses and charges properly allowable as deductions therefrom, and makes the following return:

General Information

1. Date of death: April 2, 1925.
2. Resident of N. Y. County.
[fol. 21] 3. Did the decedent leave a will? (Answer "yes" or "no.") Yes.
(If the answer is "yes" attach copy of last will.)
4. Letters of testamentary, were issued on April 16, 1925, by the Surrogates' Court of N. Y. County.
5. The names and post office addresses of the executors or administrators are:
Name: Pauline Hecht. Post Office Address: 2372 B'way, N. Y. C.
Name: Leo Salomon. Post Office Address: Lynwood Ave., Cedarhurst, L. I.
Name: Jacques H. Hecht. Post Office Address: 2373 B'way, N. Y. C.
Name: Isidore M. Kastner. Post Office Address: 272 W. 90 St., N. Y. C.

Property in the Estate.

Schedule A—Real Estate:

6. Did the decedent at the time of death own any interest in real estate located within the State of New York, individually or jointly? (Answer "yes" or "no.") No.
If the answer is "yes" attach schedule of all interest in real estate, marked Schedule A, following the instructions for that schedule.

Schedule B—Cash:

7. Did the decedent at the time of death own any cash or have any money on deposit individually or jointly? (An-
[fol. 22] swer "yes" or "no.") Yes.
If the answer is "yes" attach Schedule of such cash and deposits, marked Schedule B, following instructions for that schedule.

Schedule C—Personal Effects:

8. Did the decedent at the time of death own any wearing apparel, jewelry, silverware, pictures, books, works of art, household furniture, horses or live stock, carriages, automobiles, boats, or any other personal chattels or whatever kind or nature including leases on real estate, wheresoever located? (Answer "yes" or "no.") Yes.

If the answer is "yes" attach Schedule C, setting forth in detail all such property, together with a fair market value thereof, following the instructions for that schedule.

If an appraisal is furnished specifying each item of personal property separately, this schedule need only contain the total of such appraisal, instead of setting forth each item.

Schedule D—Mortgages, Notes and Accounts:

9. Did the decedent at the time of death own any interest in bonds or mortgages, notes or accounts receivable individually or jointly? (Answer "yes" or "no.") Yes.

If the answer is "yes" submit Schedule D, itemizing all such property in detail, together with the face values and the estimated market values thereof, following the instructions for that schedul.

[fol. 23] Schedule E—Insurance:

10. Was any life insurance receivable by the *executor* administrator? (Answer "yes" or "no.") Yes.

If the answer is "yes" attach a detailed statement of such insurance, marked Schedule E, following the instructions for that schedule.

Schedule F—Stocks and Bonds:

11. Did the decedent at the time of death own any stocks or bonds or rights to subscribe thereto? (Answer "yes" or "no.") Yes.

If the answer is "yes," enter in schedule marked "F," a complete list of all the corporate stocks and bonds, including interest and dividends thereon, at the date of the decedent's death, together with the fair market values thereof, following the instructions for that schedule.

Schedule G—Partnership or Business Interests:

12. Did the decedent at the time of death own any interest in a partnership or an unincorporated business? (Answer "yes" or "no.") No.

If the answer is "yes" submit schedule marked "G," setting forth the interest at the date of death and the fair market value thereof at that time, following the instruction for that schedule.

[fol. 24] Schedule H—Gifts and Transfers:

13. (a) Did the decedent, during the period within two years prior to his death, make any transfer of property by way of gift or without a fair consideration in money or money's worth? (Answer "yes" or "no.") No.

(b) Did the decedent, at any time prior to two years before his death, make any transfer or create any trust in contemplation of or intended to take effect at or after death or in which he reserved to himself interest, without consideration? (Answer "yes" or "no.") No.

(c) Were any trusts created by the decedent, in existence at the time of death? (Answer "yes" or "no.") No.

If the answer is "yes" attach copies of all such trust instruments.

1

(d) Did the decedent create any trust in which he had solely or with another the power of revocation? (Answer "yes" or "no") No.

If the answer to any of the foregoing questions is "yes," submit in Schedule H, a statement of the details of each transfer and lists of the property transferred, together with its value at the date of death, following the instructions for that schedule.

Schedule I—Powers of Appointment:

14. Did the decedent have any power of appointment of property in any other estate? (Answer "yes" or "no.") No.

[fol. 25] If the answer is "yes" submit the details, hereof in schedule marked "I," following the instructions for that schedule, and showing whether such power of appointment was exercised, and if so, how.

Schedule J—Interest in Other Estates:

15. (a) Did the decedent at the time of death, own any interest in any other estate? (Answer "yes" or "no.") No.

If the answer is "yes," submit statement of such interest and the value thereof at the time of death, in Schedule J, following the instructions for that schedule.

(b) Did any remainder or reversion fall in or vest in possession or enjoyment by reason of the decedent's death? (Answer "yes" or "no.") No.

If the answer is "yes," submit a detailed statement thereof in Schedule J. The valuation of the property, however, is not required.

Schedule K—Other Property:

16. Did the decedent at the time of death own any miscellaneous property not included or accountable under any other schedule? (Answer "yes" or "no.") No.

If the answer is "yes" submit Schedule K, following the instructions for that schedule.

[fol. 26] Deductions

Schedule L—Funeral and Administrative Expenses:

17. Itemize the funeral expenses and administration expenses in Schedule L, following the instructions for that schedule.

Schedule M—Debts:

18. Itemize the debts of decedent in Schedule M, following the instructions for that schedule.

Schedule N—Other Deductions:

19. Itemize in Schedule N all items claimed by the administrator executor as proper deductions herein and not included in prior schedules, following the instructions for that schedule.

Schedule O—Beneficiaries:

20. Give in Schedule O a statement of the names of all persons beneficially interested in the estate, the nature of their respective interests, etc., following the instructions for that schedule.

Did any of the beneficiaries named in the decedent's will, if any, die prior to the decedent? (Answer "yes" or "no.")

If the answer is "yes" designate in Schedule O which beneficiary died prior to the decedent and show his survivors, and the relationship of such servivors to the decedent.

[fol. 27] General Affidavit

21. Deponent states that he has made a due and diligent search for property of every kind, nature and description left by the decedent, and has been able to discover only that set forth in the schedules accompanying this return and that no information of any other property of the decedent has come to the deponent's knowledge, and that the deponent verily believes the decedent left no property except as herein set forth; that Schedule A sets forth all the real estate in which the decedent at the time of death had any interest either individually or jointly with another; that Schedule B shows all cash or money which the decedent had on hand or on deposit, individually or jointly; that Schedule C shows all the personal effects, wearing apparel, jewelry, silverware, pictures, books, works of art, household furniture, horses or other live stock, carriages, automobiles, boats or any other personal chattels of whatever kind and nature, including leases on real estate wherever located; that Schedule D sets forth all mortgages held by the decedent and all claims due and owing to the decedent at the time of death, and all promissory notes or other instruments in writing for the payment of money in which the decedent died possessed; that Schedule E sets forth any

and all life insurance payable to the estate; that Schedule F sets forth all the corporate stocks, bonds and other securities owned by the decedent at the time of death; that Schedule G sets forth the interest of the decedent at the time of death in any copartnership or business; that Schedule H [fol. 28] sets forth all property wheresoever situated, of which the decedent at any time made any grant, bargain sale or gift in contemplation of death, or intended to take effect in possession or enjoyment at or after the death of the decedent, and all the transfers made within two years prior to the death without a valid and adequate consideration, and all trusts in which the decedent had solely or with another the power of revocation, and that the decedent made no gifts or transfers except as stated therein; that Schedule I sets forth all property over which the decedent had a power of appointment, whether such power was exercised or not; that Schedule J sets forth the interest of the decedent in any estate of another; that Schedule K sets forth any and all property owned by the decedent in which he had any right or interest whatsoever which was not set forth in the preceding schedules; that the deponent has carefully read the instructions printed on this form and that all the answers contained therein are in accordance with such instructions; that to the best of deponent's knowledge, and belief, the value shown for each item of property listed herein is the actual and full value at the time of decedent's death, and that the debts, expenses and charges entered herein, as deductions from the gross estate, are correct and legally allowable, and are not contested by the estate except as stated in the schedules.

22. The deponent further states that wherever in any part of this return or in any schedule the words "non" or "no" have been written, or wherever such schedule or any query has been left blank, such word or omission is to be [fol. 29] taken as equivalent to an affirmative allegation by deponent that the decedent left no property of any kind to which the schedule relates.

Leo Salomon, Executor.

Sworn to before me this 18th day of June, 1925. Yetta Messer, Notary Public. N. Y. Co. Clerk's No. 422. Reg. No. 6282. Kings Co. Clerk's No. 152. Reg. No. 6449. Commission expires March 30, 1926.

Schedule A

. . . . . .

Schedule B

Balance National City Bank	$967.89
Central Savings Bank	974.57
Union Dime Savings Bank	1.41
Total	$1,943.87

Schedule C

Personal Property as per appraisal attached	372.

[fol. 30] Schedule D

Mortgages:

Far Rockway Mortgage:	
Principal	8,500.
Accrued interest	141.66
Far Rockway Mortgage:	
Principal	13,250.
Accrued interest	229.75
87th Street Mortgage:	
Principal	28,000.
Accrued interest	401.33
Accounts receivable:	
Solomon Bros. & Hutzler—credit balance	4,273.51
Jacques H. Hecht—balance	228.01
Treas. of U. S. tax refund	96.58
Total	55,120.84

Schedule E

Mutual Life Insurance Co. Policy #259,820	8,612.62
Mutual Life Insurance Co. Policy #920,069	9,090.34
Mutual Life Insurance Co. Policy #878,537	5,019.99
Total	22,722.95

Schedule F

1M Armour 5½s of 1923 J J—Capital	922.50
Accrued interest	13.90
4 M United Kingdom 5½s of 1937 F A Cap	4,250.
Accrued int.	37.28
1M Anaconda 6s of 1953 F & A capital	10,945.
Aced. int.	111.83
2M U. S. Steel 5s of 1963 M & N capital	2,102.50
Aced. int.	41.94
[fol. 31]	
6M Anaconda 7s of 1938 F & A capital	6,007.50
Aced. int.	71.17
2M U. N. Y. & P. 5s of 1937 J & J capital	2,000.
Aced. int.	25.28
5M Amer. Smelting & Ref. 6s of 1947 AO	5,325.
Aced. int.	.83
5M West Shore 4s of 2361 JJ value	4,112.50
Aced. int.	50.56
5M Atch. Top. S. F. 4s Gen. of 1995 AO	4,475.
Aced. int.	.56
1M Western Union 6½s of 1936 FA capital	1,100.
Aced. int.	11.01
7M Atch. Top. S. F. 4s Gen. of 1995 AO cap	6,265.
Aced. int.	.78
10M Wilson 6s of 1941 AO cap	9,600.
Aced. int.	1.67
6M Atl. Coast Line 4s of 1952 M & S	5,505.
Aced. int.	20.67
2M Missouri Pac. 1st & Ref. 6s of 1949 FA	2,010.
Aced. int.	20.33
6M Amer. Tel & Tel 5½s of 1943 M & N	6,120.
Aced. int.	138.42
L 1,000 Japanese 5s of 1947 M & S	3,700.
Aced. int	13.89
2M Balt. & Ohio 4s of 1948 A & O	1,762.50
Aced int.	.22
5M Bing & Bing 6½s of 1950 MS capital	4,925.
Aced. int	27.99
3M Balt. & Ohio 4s of 1948 A & O	2,643.75

Accd. int.	.33
1M Nash. Chat. & St. Louis 1st Cons. 5s of 1928 A & O	1,020.
Accd. int.	.14

[fol. 32]

3M Balt. & Ohio 4s of 1948 A & O	2,643.75
Accd. int.	.33
2M Chic. Mil. & St. Paul Chic. & Missouri Division 5s JJ of 1926	1,930.
Accd. int.	25.28
5M Balt. & Ohio 4½s of 1933 M & S	4,593.75
Accd. int.	19.38
10S Bethlehem Steel 8% JJ Quart	1,100.
Accd. int.	00.
50S Bethlehem Steel 8% JJ Quart	5,500.
Accd. int.	00.
6M Bethlehem Steel 6s of 1948 FA	5,655.
Accd. int.	61.
4M Bethlehem Steel 6s of 1948 FA	3,770.
Accd. int	40.67
Forward	110,719.21

2

Forward	110,719.21
2M Ches. & Ohio 5s of 1939 M & N Capital	2,035.
Accrued Interest	41.94
5M Chile Copper 6s of 1932 A & O	5,275.
Accd. int.	.83
5M Chic. Mil. & St. P. 4½s of 1989 J & J	4,150.
Accd. int.	56.88
5M Chic. North West 4s of 1987 M & N	4,218.75
Accd. int.	83.89
5M CCC St. L. 4s of 1993 JD	4,100.
Accd. int	67.22
5M CCC St. L. 4s of 1993 JD	4,100.
Accd. int	67.22
5M Col Southern 4½s of 1935 M & N	4,637.50
Accd. int.	94.38
4M Copenhagen 5½s of 1944 J & J	3,840.
Accd. int.	55.61

[fol. 33]

7M Lyons 6s of 1934 M & N	
Accd. int.	5,827.50
	176.17
7M Bodeauz 6s of 1934 M & N	
Accd. int.	5,827.50
	176.17
7M Marseilles 6s of 1934 M & N	
Accd. int.	5,827.50
	176.17
5M Cont. Gas & Elec. 6½s of 1964 A & O	
Accd. int.	4,950.
	.90
4M Denver Rio Grande 4½s of 1936 J & J	
Accd. int.	3,435.
	45.50
10M French 8s of 1945 M & S	
Accd. int.	10,000.
	37.78
4M Great Northern 7s of 1936 J & J	
Accd. int	4,380.
	70.78
5M Swedish 6s of 1939 J & D	
Accd. int.	5,181.25
	89.17
2M General Cigar 6s of 1930 J & D	
Accd. int.	2,040.
	40.33
3M Japanese 6½s of 1954 F & A	
Accd. int.	2,711.25
	33.04
2600 Chinese 5s of 1951 J & D	
Accd. int.	1,275.
	44.58
5M Jamestown, Frank & Co. 4s of 1959 J & D	
Accd. int.	4,375.
	67.22
2M Louisville & Nash. 5s of 1937 M & N	
Accd. int.	2,100.
	41.94
3M Louisville & Nash. Un. 4s of 1940 J & J	
Accd. int.	2,816.25
	30.33
11M Louisville & Nash. AKC 4s of 1955 M & N	
Accd. int	9,900.
	184.56

[fol. 34]

5M Long Island Ref. 4s of 1949 M & S	
Accd. int.	4,131.25
	17.22
2M Lorillard 5s of 1951 FA	
Accd. int.	1,920.
	16.94
5M Lake Shore Mich. So. 4s of 1931 M & N	
Accd. int.	4,806.25
	83.89
5M Metro. Edison 6s of 1952 FA	
Accd. int.	5,150.
	50.83

2M N. Y. Ontario & West. 4s of 1922 M & S	1,320.
Acc. int.	6.89
2M Norfolk & Western 4s of 1996 A & O	1,807.50
Accd. int.	.22
70 Shares Deal Knitting Mills Preferred capital.	6,300.
Accd. int.	140.
2M Norfolk & Western P J. B. 4s of 1941 J & D	1,825.
Accrued Interest	26.89
6M New York Central 4s of 1934 M & N	5,670.
Accd. int.	100.67
2M Northern Pac. Prior 4s of 1997 J & J Quart.	1,680.
Accd. int.	.22
5M N. Y. Chic. & St. L. 4s of 1937 A & O	4,618.75
Accd. int.	.56
2M N. Y. Chic. & St. L. 6s of 1931 M & N	2,060.
Accd. int	50.33
10M N. Y. Telephone 6s of 1941 AO	10,700.
Accd. int	1.67
3M N. Y. Central 6s of 1935 MN	3,247.50
Accd. int.	75.50

[fol. 35]

2M N. Y. Rway Adj. of 1942 A & O	80.
12M N. Y. City's 4s of 1957 M & N	11,910.
Accd. int.	201.33
24M N. Y. City 4¼s of 1960 MS	24,540.
Accd. int.	87.83
23M N. Y. City 4½s of 1965 JD	24,581.25
Accd. int.	347.88
5M Oregon RR Nav. Cons. 4s of 1946 JD	4,443.75
Accd. int.	67.22
6M Pennsylvania 4s of 1948 MN	5,610.
Accd. int	100.67
2M Pennsylvania 4s of 1948 MN	1,870.
Accd. int.	33.56
1M Pennsylvania 7s of 1930 AO	1,088.75
Accd. int.	.19
2M Rio Grande Western 4s of 1939 JJ	1,687.50
Accd. int.	20.22
$3,750 St. Louis San Fran. 4s of 1950 JJ	2,784.38
Accd. int	37.92

$1,250 St. Louis San Fran. & Adj. 6s of 1955 A & O.	
Accd. int.	1,084.38
5M Southern Pacific 4s of 1955 J & J	.21
Accd. int	4,500.
1M Tenn. Elec. 6s of 1947 JD	50.56
Accd. int.	1,005.
5M Union Pacific 4s of 1947 JJ	20.17
Accd. int.	4,631.25
$100 Bond Progress Club	50.56
$500 Liberty 3½s of 1947 JD	50.
Accd. int.	506.41
$4,600 Liberty 2nd 4¼s of 1942 MN	5.20
Accd. int.	4,644.56
$1,050 Liberty 3rd 4¼s of 1928 MS	74.40
Accd. int.	1,066.41
	2.11
[fol. 36]	
2M Liberty 4th 4¼s of 1938 A & O	2,039.38
Accd. int.	39.43
29 Shares Deal Knitting Mills Preferred	2,320.
Total Schedule F	$372,794.88

Deductions

Schedule L

Funeral Expenses and Administration Expenses

Chas. N. Pollak—funeral director, coffin, etc	$933.40
Rev. Nathan Krass—officiating at funeral	100.
Adler's Monument and Granite Works, Inc. for mausoleum to be erected	6,700.
Attorneys' fees (estimated)	10,000.
Leo Salomon—Petty cash	10.
Friend, Wiener Donohue Advertising Co	120.
Petty Cash	5.
Valuation Co. of America—appraisal	25.
Executors' commissions	27,177.27
Total	$45,130.67

Schedule M

Debts

Benjamin Saltzer Physician	440.
Mark Rafalsky Co. rent for period April 1st, 1925 to October 1st, 1925 as per lease	1,812.48
[fol. 37] Mark Rafalsky Co. electric light	9.22
Estimated Federal Income Tax from January 1st to April 1st	190.
Estimated New York State Income Tax January 1st to April 1st	37.
Total	$2,488.70

Schedule O

List of Beneficiaries

Mt. Sina Hospital of the City of (exempt) New York—100th St. & Fifth Avenue	$500.
Montefiore Home for Chronic Invalids Gun Hill Road and Bainbridge Ave. Bronx, New York	500.
Miriam Hecht, sister, 1930 Grand Concourse, Bronx, New York	5,000.
Hannah Hecht, sister, 1930 Grand Concourse, Bronx, New York	5,000.
Rita Adele Salomon, grand-daughter, Lynwood Avenue, Cedarhurst, L. I. N. Y	10,000.
John Leo Salomon, grandson, Lynwood Avenue, Cedarhurst, L. I. N. Y	10,000.
Paula Ann Kastner, grand-daughter, 272 West 90th Street, New York City	10,000.
Leo Salomon, son in law, Lynwood Avenue, Cedarhurst, L. I	10,000.
Jeanette H. Kastner, daughter, 272 W. 90th Street, New York City—33 years old	15,000.
[fol. 38] Jacques H. Hecht, son, 39 years old, 2372 Broadway, New York City	15,000.
Plus twenty-nine shares of common stock of Deal Knitting Mills valued at	2,320.
Pauline Hecht, wife, 64 years old, 2372 Broadway, New York City, life interest in remainder of estate valued at about	300,000.

Contingent remainder to the three children of testator above-mentioned, Sophie H. Salomon, Jacques H. Hecht and Jeanette H. Kastner provided they survive Pauline Hecht.

(40 yrs.)

The remainder to children of deceased children if there be any.

In the case of Jacques Hecht if he die leaving a wife and children, his wife to get one third of his share.

[fol. 39] Transfer Tax Appraisal

Estate of Myer Hecht, New York City

United States Treasury Department, Internal Revenue Bureau

In the Matter of the Federal Estate Tax upon the Estate of Myer Hecht, Deceased

County and State of New York, ss:

Carl Ehrmann, being duly sworn, deposes and says: that he is associated with the Valuation Company of America, Appraisers, with offices at 350 Madison Ave., Borough of Manhattan, City of New York.

That he is now, and has been during the past 7 years an appraiser.

That he has appraised wearing apparel and jewelry and miscellaneous articles of the character similar to that incorporated in the schedules hereto annexed and is acquainted with the true market values of said articles.

That on the 16th day of May, 1925, he personally ex-
[fol. 40] amined the hereinafter property located at Belnord Apartment, corner 86th Street and Broadway, New York City, and from such examination and information obtained, is of the opinion that the fair, reasonable and market value of said property was, on the 2nd day of April, 1925, which is the date of death of deceased, as deponent is informed and believes, the sum of $372.00, as per schedules hereto annexed.

Deponent further says that he is not related to any of the parties and is not interested in this proceeding.

Carl Ehrmann.

Sworn to before me this 19th day of May, 1925. D. F. De Baun, Notary Public, Rockland County. New York County Clerk's No. 808. New York County Register's No. 7249. Commission expires March 30th, 1927.

[fol. 41] Jewelry:	Market value	
1 Waltham Watch in gold hunting case, #29205, engraved "M. H."	$10.00	
2 Small pearl studs, gold links	15.00	
1 Gentleman's gold ring set with one diamond 5/8 ct. one sapphire and one ruby	100.00	
1 Thin white gold watch chain, 11 links, with gold clasps	2.50	
1 Thin gold watch chain with locket, set with small diamond and 22 emerald chips	15.00	
1 Gold Horseshoe stick pin, set with 19 small diamonds in platinum	25.00	
5 Assorted gold stick pins	14.00	
3 Gold shirt studs with diamond chips	5.00	
1 Watch fob with Cameo and gold clasp	3.00	
1 14 kt. gold safety match box, monogramed "M. H."	2.50	
1 Assorted lot of gold collar buttons, shirt studs and cuff links, 12 pieces	5.00	
Total jewelry		$197.00
Wardrobe:		
1 Lot of assorted personal Wearing apparel	175.00	
Total wardrobe		175.00
Grand Total		$372.00

[fol. 42] Decedent's Last Will and Testament

I, Meyer Hecht, of the Borough of Manhattan, City of New York, State of New York, being conscious of the un-

certainty of human existence, do make, publish and declare this to be my last will and testament:

First: I direct that my just debts and funeral and testamentary expenses be paid as soon after my decease as may be practicable.

Second: I give and bequeath to the Mt. Sinai Hospital of the City of New York, the sum of Five hundred ($500) Dollars.

Third: I give and bequeath to the Montefiore Home for Chronic Invalids of the City of New York, the sum of Five hundred ($500) Dollars.

Fourth: I give and bequeath to my sister, Miriam Hecht, of the City of New York, the sum of Five thousand ($5,000) Dollars.

Fifth: I give and bequeath to my sister, Hannah Hecht, of the City of New York, the sum of Five thousand ($5,000) Dollars.

Sixth: I give and bequeath unto my beloved granddaughter, Rita Adele Salomon, the child of my daughter, Sophie H. Salomon, wife of Leo Salomon, the sum of Ten thousand ($10,000) Dollars; the sum of Ten thousand ($10,000) dollars unto my beloved grandson, John Leo Salomon, the son of my daughter, the said Sophie H. Solomon, wife of Leo Salomon; and the sum of Ten thousand [fol. 43] $10,000) Dollars unto my beloved granddaughter, Paula Ann Kastner, the child of my daughter, Jeanette H. Kastner, wife of Isidor M. Kastner, all of the City of New York.

Seventh: The said sums of money bequeathed to my grandchildren shall not be paid over to them by my Executors and Trustees hereinafter named until they shall respectively arrive at the age of twenty-one years, or being granddaughters, in the event of their marriage taking place before their arrival at the age of twenty-one years, upon the date of the marriage. That during such times as said moneys are directed to be held by my Executors and Trustees, they shall be held by said Executors and Trustees, to receive the rents, profits and income thereof, and to pay the

same to the mothers of the infants, and in the event of the death of the mothers, then to their fathers, to be applied to the maintenance, support and education of said infants, and said Executors and Trustees shall invest the said principal sums and keep the same invested.

Eighth: In the event of any of my grandchildren predeceasing me or dying before the termination of the trusts provided for said child in Paragraph Seventh herein, then his or her share shall be paid over to the mother of such child or children, if then living, and in the event of the prior death of such mother, then the said legacy shall revert to the residuum of my estate.

Ninth: Having advanced and given certain sums for the purposes of his business to Isidor M. Kastner, and not having so done on behalf of my son in law, Leo Salomon, [fol. 44] I hereby give and bequeath to my said son in law, Leo Salomon, of the City of New York, the sum of Ten thousand ($10,000) Dollars for his own use absolutely and forever, and insofar as may be necessary, I hereby confirm such advances in my lifetime unto my son in law Isidor M. Kastner, for his own use absolutely and forever.

Ten: Having heretofore made advances to my daughters, Sophie H. Salomon and Jeanette H. Kastner, and my daughter Jeanette H. Kastner having received a lesser portion than my daughter, Sophie H. Salomon, I hereby give and bequeath the sum of Fifteen thousand ($15,000) Dollars to my said daughter, Jeanette H. Kastner, for her own use absolutely and forever.

Eleventh: Having made advances as wedding gifts and otherwise to my daughters, Sophie H. Salomon and Jeanette H. Kastner, or having made provisions for each of them during my lifetime or herein, and not having made advances of like amounts to my son, Jacques H. Hecht, I hereby given and bequeath the sum of Fifteen Thousand ($15,000) Dollars, together with all of my common stock in the the Deal Knitting Mills, Inc., to my said son Jacques H. Hecht, for his own use absolutely and forever, and insofar as maybe necessary I confirm any and all such advances unto him for his own use absolutely and forever.

Twelfth: I give and bequeath unto my beloved wife Pauline, all my horses, carriages, jewelry of whatsoever kind and description, pictures, plate, household effects and [fol. 45] furniture, bric-a-brac and all personal effects unto me belonging, for her absolute use forever.

Thirteenth: In the event that I shall not have contracted for a mausoleum large enough to hold twelve bodies to include the remains of my daughter, Rita Hecht, I hereby order and direct my Executors and Trustees to spend a sum not exceeding Five Thousand ($5,000) Dollars for the building and completion of such structure, and the same to be erected on my cemetery plot in Salem Fields, Brooklyn, New York.

Fourteenth: All the rest, residue and remainder of my property and estate, as well real as personal, and wheresoever situated, which at the time of my death shall belong to me or be subject to my disposal by Will, I give, devise and bequeath to my Executors and Trustees hereinafter named in trust, nevertheless, to invest the same and to keep the same invested, and to receive the rents, issues, income and profits therefrom, and after defraying all taxes and other lawful charges upon the same, to pay the net income thereof to the use of my wife, Pauline Hecht, during her life, absolutely.

The provision herein to my said wife as aforesaid I hereby declare is intended to be and is so given to her in full satisfaction and in lieu of and for her dower, which she may or can in any wise claim or demand out of my estate.

Fifteenth: Upon the death of my said wife, Pauline, I direct my Executors and Trustees "to divide the said estate so held in trust into such number of equal shares as shall [fol. 46] be equal to the number of my children who shall survive my said wife, and of my children who shall have died leaving issue who shall survive her, and I give, devise and bequeath one of each of the said shares unto each of my said children who shall survive her and one of each of the remaining said shares I separately give, devise and bequeath unto my executors and Trustees in trust, nevertheless, respectively for the issue of each other child of mine

who shall have died either before me or before my said wife leaving issue her surviving, in equal shares per stirpes and not per capita, and to pay respectively each share in equal shares to such issue of such of my said children when they shall respectively arrive at the age of twenty-one years; or being my granddaughters in the event of their marriage taking place before their arrival at the age of twenty-one years, upon the date of the marriage." That during such times the said moneys are directed to be held by my Executors and Trustees they shall be held to receive the rents, profits and income thereof and to pay the same to the then living parent of said infants to be applied to the maintenance, support and education of said infants, and if no one of the parents of the said infants be then living, my said Executors and Trustees shall apply the said rents, profits and income to the maintenance, support and education of said infants, and said Executors and Trustees shall invest the said principal amounts and keep the same invested. In the event however, that my said son Jacques H. Hecht should die before my said wife, leaving both a wife and child or children surviving my said wife, then upon the death of my wife I hereby direct that his said share or the share of his said children shall be divided [fol. 47] into one third and two thirds parts, and only the two-thirds part thereof shall be subject to the aforesaid trust for his issue, and the other one third part thereof I hereby give, devise and bequeath to his said wife to her own use absolutely and forever, but should there be no child or children of my said son and said wife then surviving, his said wife shall receive no share in my said estate.

Sixteenth: I hereby authorize and empower my said Executors and Trustees and the survivors or the survivor of them to sell and dispose of all my real estate or personal property of which I may die seized or possessed as aforesaid, either at public or private sale, in the exercise of their best judgment, and to execute and deliver proper contracts and deeds for the legal conveyance of the same and to take back purchase money mortgages for part consideration for said sale or sales, and in the event of a proper occasion arising, they are further authorized in

the event of not making a sale, to make, execute and deliver leases of the same for such time and upon such terms as to them may seem meet and proper, and always looking to the best interests of the estate.

Seventeenth: I hereby authorize and empower my Executors and Trustees or the survivors or survivor, successor or successors, or the one, or those thereof, who shall qualify and shall be Executor and Trustee or Executors and Trustees for the time being, of this my Last Will and Testament, if, in his or their discretion, it shall seem expedient to retain any of my property in the same form of investment [fol. 48] in which it may be at the time of my death, any law to the contrary notwithstanding. And I hereby declare and it is my Will, that my Executors and Trustees, or those who may be acting, or their successor or successors, shall not be restricted to the investments provided by law in which Executors and Trustees may invest, but shall have full power and authority to invest in any securities, bonds or other investments, which in his or their judgment are safe, and for the best interests of my estate, and that all such property, whether in the original or the converted state, shall be subject to the powers, provisions, regulations and trusts herein contained.

Eighteenth: All legacies, hereby bequeathed, and all devises hereby given, are bequeathed and given free and clear of all transfer taxes and all other taxes imposed upon the right of inheritance or succession; and all such taxes shall be paid by my Executors and Trustees out of my residuary estate, and not out of such legacies or devises or by such legatees or devisees, nor shall such taxes be deducted from such legacies or devises.

Nineteenth: I hereby nominate, constitute and appoint my beloved wife, Pauline Hecht, my brother-in-law, Adolph Wurzburger, my beloved son, Jacques H. Hecht and my sons in-law, Leo Salomon and Isidor M. Kastner and the survivor or survivors of them Executrix and Executors, Trustee and Trustees of this my Last Will and Testament, and I desire that no bond or other security for the performance of their duties shal be given by them or either of them.

Twentieth: In my two safe deposit boxes will be found life insurance policies, three in the Mutual Life of the City [fol. 49] of New York, Nos. 259280A, 878537 and 920069 and in the Northwestern Mutual Life of Milwaukee, Wisconsin, policy No. 199302, wherein the beneficiary mentioned is my beloved wife, Pauline Hecht. In such boxes are club bonds and other securities and savings bank books.

Lastly: I hereby cancel and revoke any other former Wills or Codicils by me heretofore made.

In witness whereof, I have hereunto set my hand and seal this 27th day of November, Nineteen Hundred and Seventeen.

Myer Hecht.

On this 27th day of November, Nineteen Hundred and Seventeen, the above-named Testator, Myer Hecht, in our presence subscribed and sealed the foregoing instrument, and declared the same to be his Last Will and Testament, and thereupon we, at his request, and in his presence, and in the presence of each other have hereunto subscribed our names as attesting witnesses.

Louis Maxwell Cohen, 251 West 92nd St., New York City. Berthold S. Horkheimer, 63 Esplenade, Beechmont Park, New Rochelle, N. Y. C. Agnes Berard, 213—11th St., Brooklyn, N. Y.

[fol. 50] In Surrogates' Court of New York County

In the Matter of Proving the Last Will and Testament of Myer Hecht, Deceased

Affidavit Proving a Correct Copy of the Will Filed for Probate

County and State of New York, ss:

We Estelle Gallen and Rose R. Sobel being duly and severally sworn say, each for herself, that she has carefully compared the foregoing paper with the original thereof dated the 27th day of November, 1925, about to be filed for

probate, and that the same is in all respects a true and correct copy of said instrument and of the whole thereof.

Estelle Gallen, Rose R. Sobel.

Sworn to before me this 7th day of April, 1925. Yetta Messer, Notary Public, New York County. N. Y. Co. Clerk's No. 422. Reg. No. 6282. Kings Co. Clerk's No. 152. Reg. No. 6449. Commission expires March 30, 1926.

[fol. 51] CHAMBERS OF THE SURROGATES' COURT OF NEW YORK COUNTY

REQUEST TO SUPERINTENDENT OF INSURANCE FOR VALUE OF LIFE ESTATE

New York, October 27, 1925.

Estate of Myer Hecht, Deceased.
Date of Death, April 2, 1925.

DEAR SIR: In pursuance of Chapter 483, Laws of 1885, and the acts amendatory thereof and supplemental thereto, you are hereby requested to determine and ascertain the values of the following Estates, Annuities and Interest:

Name	Age	Legacy or estate	Value or amount
Pauline Hecht	64	Life estate in	$322,094.37

To the Superintendent of Insurance Department, State of New York.

Yours Respectfully, M. F. Loughman, Appraiser.

Return to Transfer Tax Bureau, 220 W. 40th Street, New York City.

[fol. 52] RETURN OF SUPERINTENDENT OF INSURANCE STATING VALUE OF LIFE ESTATE

State of New York, Insurance Department

Estate of Myer Hecht, Deceased

Albany, October 28, 1925.

DEAR SIR: In reply to your application of Oct. 27, 1925, I hereby certify to the present values as follows:

Name	Legacy	Present value April 2, 1925
Pauline Hecht	Life estate in $322,094.37	$124,957.

Yours very truly, James A. Beha, Superintendent.

To Hon. M. F. Loughman, Appraiser, New York County, New York, N. Y.

Mailed to Transfer Tax Bureau, 220 W. 40th Street, New York City.

Attention of Mr. Stalhuth.

[fol. 53] IN SURROGATE COURT OF NEW YORK COUNTY

OPINION OF SURROGATE

O'BRIEN, S.:

On this appeal by the executors from the order fixing the transfer tax the constitutionality of chapter 144 of the Laws of 1925, amending section 230 of the Tax Law, is questioned. In the following excerpt from the sixth paragraph of section 230 the words in italics indicate the portion added to the section by the amendment: "When property is transferred in trust or otherwise, and the rights, interests or estates of the transferees are dependent upon conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, *which tax shall be computed on the full, undiminished value of such property at the time of the transfer without deduction for*

or on account of any intervening estate or interest, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred, and the surrogate shall enter a temporary order determining the amount of said tax in accordance with this provision; provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this article, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article, *computed upon the full, undiminished value of the property as aforesaid.*" The act took effect March 16, [fol. 54] 1925. The decedent died April 2, 1925. The report of the transfer tax appraiser has been prepared in accordance with the requirement of the statute. By the will of decedent the residuary estate is given in trust to pay the income to his wife, Pauline Hecht, during her life. On her death the remainder is to pass to the children or issue of deceased children. The residuary estate is appraised at $322,094.37. The value of the widow's life estate, computed by the superintendent of insurance on her expectancy of life at her age (64) at the date of decedent's death, is $124,957. The tax on this transfer is $2,348.71. The residuary estate of $322,094.37 is taxed against the executors for the benefit of the 1 per cent. class. The tax is $9,633.77. It is contended by the appellants that the imposition of the tax on the life estate of the widow plus the tax on the entire residuary estate is a violation of the provisions of the federal and state constitutions prohibiting the taking of property without just compensation and without due process of law in that a tax is being imposed "on more property than decedent owned at his death." The appeal must be denied. If the statute did in fact and law impose a tax as of the date of the death of the decedent on the entire fund as well as on the value of the life estate the legality of its provisions might be open to serious question. This is not the effect of the enactment. Section 230 must be read and construed in connection with section 241 of the Tax Law, which was also amended by

chapter 144 of the Laws of 1925. The second paragraph of section 241 provides as follows: "Whenever the tax on a contingent remainder has been determined at the high[fol. 55] est rate which on the happening of any of said contingencies or conditions would be possible under the provisions of this article, the tax commission, in the counties wherein this tax is payable direct to it, and in all other counties the treasurer of said counties, respectively, when such tax is paid shall retain and hold to the credit of said estate the tax assessed upon such contingent remainders and the tax commission or the county treasurer shall deposit the amount of tax so retained in some solvent trust company or trust companies or savings banks in this state designated by the state comptroller, to the credit of the state comptroller on account of such estate paying the interest thereon when collected by them to the executor or trustee of said estate, to be applied by said executor or trustee as provided by the decedent's will. Upon the happening of the contingencies or conditions whereby the remainder ultimately vests in possession, if the remainder then passes to persons taxable at the highest rate, the state comptroller on the certificate of the tax commission, shall turn over the amount so retained to the state treasurer as provided herein and by section two hundred and forty of this chapter, of if the remainder ultimately vests in persons taxable at a lower rate or a person or corporation exempt from taxation by the provisions of this article, the state comptroller on the certificate of the tax commission shall refund any excess of tax so held to the executor or trustee of the estate, to be disposed of by said executor or trustee as provided by the decedent's will. Executors or trustees of any estate may elect to assign to and deposit with the tax commission or the county treasurer, bonds or other securities of the estate [fol. 56] approved by the tax commission, both as to the form of the collateral and the amount thereof, for the purpose of securing the payment of the tax on said remainder, which said bonds or other securities, shall be held by the tax commission, or the county treasurer, to the credit of said estate until the actual vesting of said remainders, the income therefrom when received by the tax commission or the county treasurer to be paid over to the executor or trustee during the continu-

ance of the trust estates." It appears from the foregoing section that the cash or its equivalent required to be deposited covering the amount of tax due on the value of the undiminished remainder is in fact merely security for the subsequent payment of the tax. The state receives no part of the money until the actual vesting. The entire income of the amount deposited is paid to the executor or trustee. Instead of working a hardship as claimed by the appellants the provision operates for the benefit of the interested parties. There is no diminution of the income of the life tenant and the remainderman is not called upon to pay any of the tax until he receives the undiminished fund. There is a provision in the amendment of section 230 for the filing of a bond in case the personalty is insufficient to pay the tax. The provision for the taxation of remainders at their undiminished value became a part of the Tax Law by chapter 284 of the Laws of 1897. It was omitted when chapter 76 of the Laws of 1899 was enacted. It was restored by chapter 173 of the Laws of 1901 and has been on the Tax Law since that time. Until the enactment of the present amendment, however, it applied only to those remainders, the taxation of which was suspended in original transfer tax proceedings. The validity of the provisions [fol. 57] taxing full undiminished remainders was sustained by the Court of Appeals in Matter of Seligmann (170 App. Div. 837, aff'd 219 N. Y. 656). In that case the will of the decedent provided that certain shares of a trust fund should be paid to his sons when they reached the ages, respectively, of twenty-one, twenty-five and thirty years, the income to be paid to them in the meantime. The value of each installment was appraised at $70,573.43. The appraiser fixed the values of the temporary life estates of each of the sons at certain amounts and the order fixed the tax on these respectively, suspending the tax on the remainders. When one of the sons had arrived at the age of twenty-one years and the other at twenty-five, application was made to fix the tax on the remainders. The order entered on the application fixed the tax in each case on the difference between the value of the temporary life estate and the value of the installment payable to each. The court reversed the order and held that the tax should be imposed on $70,573.43, the value of the installment of

each; in other words, upon the full undiminished value of the principal of the installment. The requirement in the amendment of the deposit of cash or securities to insure the ultimate payment of the tax is within the powers of the Legislature. Prior to the enactment of chapter 800 of the Laws of 1911 a tax was imposed on contingent remainders at the highest possible rate. As the tax was to be paid out of the property transferred and accrued at the date of decedent's death the life tenant was deprived of the income from the amount of so much of the principal as was applied to the payment of a tax which in most cases was greater than that ultimately found to be due. The in-[fol. 58] equitable result of the operation of the statute was recognized in Matter of Brez (172 N. Y. 609). A remedy was suggested to the Legislature in the opinion in that case, written in 1902. By chapter 800 of the Laws of 1911 sections 230 and 241 of the Tax Law were amended so that in lieu of the payment in cash of the tax on contingent remainders, cash or securities might be deposited for the difference between the tax which would be due if the contingencies had happened at the date of the appraisal and the tax assessed at the highest rate. This amendment, while lessening to a considerable extent the hardship to the life tenant, did not completely eliminate it, for he was still deprived of the income on the so-called minimum tax upon the remainder. By the enactment of the amendment of 1925, which is under discussion here, the life tenant receives the income on the entire remainder, the remainderman receives the remainder unimpaired and is not called upon to pay the tax until it actually vests in his possession, the only loss or disadvantage to any of the interested parties being the (1) pro tanto loss to the life tenant of the income upon that portion of the fund used to pay the tax on the life tenant's interest, and (2) the loss in principal to the remainderman of the same amount. In discussing a question arising under the Tax Law as it stood in 1917, and prior to the amendment here in question, Judge Cardozo said (Matter of Parker, supra, 226 N. Y. 260, at page 264): "Everywhere the scheme disclosed is absolute safety for the state with a minimum of hardship for the life tenant." Under these more recent amendments this language has greater force, for there is still further amelioration of the

hardship upon the life tenant. The order fixing tax is affirmed. Submit order on notice.

[fols. 59 & 60] STIPULATION WAIVING CERTIFICATION

It is hereby stipulated that the foregoing are true copies of the notice of appeal to the Appellate Division, the order of Surrogate John P. O'Brien, appealed from and all the papers used by the Surrogate in making said order, and the whole thereof now on file in the office of the Clerk of the Surrogates' Court for the County of New York, and that certification thereof is hereby waived.

Dated New York, September 15th, 1926.

Ehrich & Mencher, Attorneys for Appellants.
Charles A. Curtin, Attorney for Respondent.

[fol. 61] IN SURROGATES' COURT OF NEW YORK COUNTY

In the Matter of the Transfer Tax Upon the Estate of Myer Hecht, Deceased; Leo Salomon et al., as Executors, Petitioners-Appellants; State Tax Commission of New York, Respondent

NOTICE OF APPEAL TO COURT OF APPEALS

Please take notice that the petitioners herein, Leo Salomon, Jacques H. Hecht, Isidore M. Kastner and Pauline Hecht, as executors of the Last Will and Testament of Myer Hecht, deceased, and Pauline Hecht, in her own right, hereby appeal to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court for the First Department entered herein in the Office of the Clerk of the Appellate Division of the Supreme Court for the First Department on or about the 4th day of March, 1927, affirming the order of the Surogates' Court of the County of New York entered herein on the 7th day of May, 1926, which said order of the Surrogates' Court of the County of New York affirmed the pro forma order entered in the said Court on the 11th day of November, [fol. 62] 1925, fixing the Transfer Tax in the estate of said decedent, and from the whole and each and every part of said order of the said Appellate Division.

This appeal is taken as of right under and by virtue of subdivision 1 of Section 588 of the Civil Practice Act, on the ground that there is directly involved in this proceeding the contruction of the Constitutions of the State of New York and of the United States.

Dated May 9th, 1927.

Yours, &c., Ehrich & Mencher, Attorneys for Appellants. Office and P. O. Address: 20 Broad Street, New York, N. Y.

To Hon. Martin G. McCue, Clerk of the Surrogates' Court of the County of New York, Hall of Records, Chambers Street, New York, N. Y.; Charles A. Curtin, Esq., Attorney for State Tax Commission, 220 West 40th Street, New York, N. Y.

[fol. 63] In Supreme Court of New York, Appellate Division

In the Matter of the Transfer Tax upon the Estate of Myer Hecht, Deceased; Leo Salomon et al., as Executors, Appellants; State Tax Commission of New York, Respondent.

Order of Affirmance on Appeal from Surrogate—March 4, 1927

An appeal having been taken to this Court by the Executors from the order of the Surrogates' Court of the County of New York, entered in the Surrogates' Court on the 7th day of May, 1926, affirming an order entered on [fol. 64] the 11th day of November, 1925, fixing transfer tax, and said appeal having been argued by Mr. Edmund O. Austin of counsel for the appellant, and by Mr. Seth T. Cole of counsel for the respondent and by Mr. Russell L. Bradford of counsel for Taylor, Blanc, Capron & Marsh, Amici Curiae; and due deliberation having been had thereon,

It is hereby unanimously ordered and adjudged that the order so appealed from be and the same is hereby affirmed with costs.

Enter: V. J. D., J. S. C.

[fol. 65] In Surrogates' Court of New York County

In the Matter of the Transfer Tax upon the Estate of Myer Hecht, Deceased

Order on Remittitur—March 30, 1927

Leo Salomon, et al., as executors of the Last Will and Testament of Myer Hecht, deceased, and Pauline Hecht, one of said executors and beneficiary under the will, individually, having appealed to the Appellate Division of the Supreme Court of the State of New York for the First Department from the order of the Surrogates' Court of the County of New York entered May 7th, 1926, affirming the order theretofore made and entered on the 11th day of November, 1925, fixing and assessing a tax upon the transfers of the property of said decedent under the law relating to taxable transfers of property, and the said appeal having been duly argued in the said Appellate Division of the Supreme Court of the State of New York, and after due deliberation the said Appellate Division of the Supreme Court of the State of New York having directed that the [fol. 66] order so appealed from be affirmed with costs and disbursements, and having remitted the proceedings herein to this Court to be proceeded upon according to law.

Now, upon reading and filing the remittitur from the Appellate Division of the Supreme Court of the State of New York for the First Department and upon motion of Charles A. Curtin, attorney for the State Tax Commission, respondent, it is

Ordered that the said order of the Appellate Division of the Supreme Court of the State of New York for the First Department be and the same is made the order of this Court; and it is

Further ordered that pursuant to the aforesaid order, the State Tax Commission of the State of New York recover from the estate of Myer Hecht, deceased, the sum of $78.70 costs and disbursements as taxed.

James A. Foley, Surrogate.

[fol. 67] OPINION

PROSKAUER, J.:

These appeals concern the constitutionality and interpretation of the amendments to Section 230 of the Tax Law made by Chapter 144 of the Laws of 1925. Prior to the enactment of that statute, under this section a contingent remainder was assessed for taxation at the highest rate possible on the happening of any contingencies and the tax was presently levied. By Section 241 it has been provided that the State should retain and hold to the credit of the estate so much of the tax assessed upon such contingent remainders as represented the difference between the tax at the highest rate and the tax upon such remainders which would be due if the contingencies had happened at the date of the appraisal. This difference, subject to the payment of interest thereon, was thus retained by the State, with certain alternatives as to the giving of a bond, and when the reminder finally vested in possession there was a proper adjustment with the estate. It was the settled practice under this statute to compute by mortality tables the value of the life estate and the value of the remainder. An exception to this was that in certain unusual cases, where it was impossible to comput by the mortality tables furnished by the Superintendent of Insurance the present worth of the future contingent remainder, the payment of the tax was postponed until the date of vesting and the value of the remainder was then computed on the basis of the market worth of the corpus at the time of the testator's death without any deduction for the value of the intervening life estate.

[fol. 68] Under certain earlier forms of the statute this latter method was held to be valid in Matter of Seligmann (170 App. Div. 837; affd., 219 N. Y. 656). The change effected by the 1925 statute was to require the present assessment of the contingent remainder to be "on the full, undiminished value of such property at the time of the transfer without deduction for or on account of any intervening estate or interest." It further required the tax to be computed upon this valuation.

Section 241 was also amended correspondingly to provide that the Tax Commission should retain not merely

the above stated portion of the tax, but should retain the entire tax until the time of vesting, in effect, as security for the ultimate payment of the tax. This deposit may be made in cash or in approved bonds or securities, and until the actual vesting of the remainders, the income thereof is required "to be paid over to the executor or trustee during the continuance of the trust estates."

The decedent Myer Hecht left a residuary estate in trust amounting to $322,094.37. The widow was the beneficiary for life with contingent remainder. Her life interest as fixed on the mortality tables is worth $124,957. An inheritance tax has been levied on that amount against her life interest, and a tax in addition, based on the entire corpus of the trust estate, namely, $322,094.37, has been levied on the remainder which the State Tax Commission insists must be paid, to be held by it subject to the provisions of Section 241, the income on this tax to be paid to the executors during the pendency of the trust. The Surrogate [fol. 69] has approved this procedure. The appellants claim, first, that the statute of 1925 should not be so construed, and second, that if so construed it is unconstitutional.

On the question of construction the appellants contend that the Legislature could not have intended that the words "which tax shall be computed on the full, undiminished value of such property at the time of the transfer without deduction for or on account of any intervening estate or interest" should involve present taxation of a future interest at its face value; that the words "such property" must be interpreted to mean trust property, and that the statute should be construed, therefore, to mean that the value of the entire trust should not be diminished by any intervening life estate. This construction would render the amendment meaningless. The statute is too plain for such subtlety. It means exactly what it says, that contingent remainders are to be assessed for the purposes of the Act without deduction of the value of the life estate.

We are, therefore, to determine whether this statute violates any constitutional provision. The appellants contend that where the entire fund is $322,094.37, the life estate is valued at $124,957 and the remainder is valued at $322,094.37, there has been taxed a transfer of property amount-

ing by $124,957 more than in fact passed under the testator's will. This argument is plausible, but unsound. It ignores completely the element of time and the simple mathematical concept of present worth. If the State became at once beneficially entitled to the tax on the contingent remainder, the mathematical conclusion reached by [fol. 70] the appellants would be correct. But the State does not presently get this tax. The income from the cash or securities deposited to cover the tax goes back to the estate during the whole duration of the trust. There is no difference between taxing a contingent remainder on the assessment of its present worth, with a tax payable presently, and taxing it, with a tax payable at the date of vesting, on its face value rather than its present worth. One is the exact arithmetical equivalent of the other. No property right is invaded by this scheme of taxation. Viewed as an entity, the estate is not harmed because in effect it merely deposits security for the tax. The life tenant is not harmed because she does not lose the income by premature payment of the tax, but is safeguarded in her enjoyment of that income by the provisions of Section 241. The remainderman loses an advantage that he had before the amendment, but is deprived of nothing to which he is entitled. Prior to the amendment he would at the date of vesting have received his remainder subject to a tax based on its present worth at the date of death. Under Matter of Seligmann (170 App. Div. 837; affd., 219 N. Y. 636), if the tax was not payable until the date of vesting, it was proper for the authorities to assess at the face value of the remainder and not on its present worth. That is exactly what is done under the revised scheme. There is no double taxation for the State does not secure the beneficial enjoyment of the tax until the date of vesting. It is true that the Seligmann case was decided on the basis of one of the exceptions to the old procedure, where the Superintendent of Insurance's tables did not furnish sufficient basis [fol. 71] for working out the present value of the contingent remainder, but the constitutional question underlying both cases is the same. The State invades no constitutional right by assessing a contingent remainder at its face value rather than its present worth if the State postpones its beneficial collection of the tax until the date of vesting.

The Inheritance Tax Law or the Transfer Tax Law has been one of development by gradual changes tending to secure the State in its right to collect the tax without unfairness to the beneficiaries. The difficulties of practical procedure have been recognized by the courts and each successive attempt of the Legislature to clarify the procedure has been approved. If this Statute provided that the assessment should be made on face value at the time of the vesting, it could not be questioned. It should be just as free from challenge where, though the assessment is presently made, the tax is beneficially taken by the State only at the time of vesting.

The orders appealed from should be affirmed, with costs.

[fol. 72] STIPULATION WAIVING CERTIFICATION

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing papers are true and correct copies of the notice of appeal to the Court of Appeals, the order of affirmance of the Appellate Division of the Supreme Court for the First Department appealed from, and all of the papers upon which the said order of the said Appellate Division was founded, and upon which the courts below acted, and also of the order of the Surrogates' Court of the County of New York, entered upon the said order of the Appellate Division, and also the opinion herein of said Appellate Division, and certification thereof is hereby waived.

Dated New York, N. Y., June 29th, 1927.

Ehrich & Mencher, Attorneys for Petitioners.
Charles A. Curtin, Attorney for Respondent.

[fol. 73] IN SURROGATES' COURT OF NEW YORK COUNTY

[Title omitted]

ORDER ON REMITTITUR—December 15, 1927

Leo Salomon, et al., as executors of the Last Will and Testament of Myer Hecht, deceased, having appealed to the Court of Appeals of the State of New York from the

order of the Appellate Division of the Supreme Court of the State of New York for the First Department entered on the 4th day of March, 1927, affirming an order entered in the Surrogates' Court of the County of New York on the 7th day of May, 1926, which said order affirmed the pro forma order entered in the Surrogates' Court of New York County on the 11th day of November, 1925, and the said appeal having been duly argued in the said Court of Appeals of the State of New York, and after due deliberation the said Court of Appeals of the State of New York having directed that the order appealed from be affirmed with costs and disbursements, and having remitted the proceedings herein to this Court to be proceeded upon according to law,

Now, upon reading and filing the remittitur from the [fol. 74] Court of Appeals of the State of New York, and upon motion of Charles A. Curtin, attorney for the State Tax Commission, respondent, it is

Ordered that the said order of the Court of Appeals of the State of New York be and the same is made the order of this Court, and it is

Further ordered that pursuant to the aforesaid order the State Tax Commission of the State of New York recover from the estate of Myer Hecht, deceased, the sum of $119.20 costs and disbursements as taxed.

Original filed Dec. 16, 1927. A true copy. Martin G. McCue, Clerk of the Surrogates' Court.

John P. O'Brien, Surrogate.

[fol. 75] In Surrogate's Court of New York County

[Title omitted]

Order for Substitution of Attorneys and Consent—February 24, 1928

On reading and filing the annexed consent, and on motion of Taylor, Blanc, Capron & Marsh, it is

Ordered, that Taylor, Blanc, Capron & Marsh, attorneys with offices at No. 22 William Street, Borough of Manhatton, City, County and State of New York, be and they hereby are substituted in the above entitled matter in the place of Ehrich & Mencher, as attorneys for Leo Salomon, Jacques H. Hecht, Isidore M. Kastner and Pauline Hecht,

as executors of the Last Will and Testament of Myer Hecht, deceased, and Pauline Hecht, individually.

John P. O'Brien, Surrogate.

[fol. 76] We hereby consent that Taylor, Blanc, Capron & Marsh, attorneys with offices at No. 22 William Street, Borough of Manhattan, City, County and State of New York, be substituted in place of Ehrich & Mencher, as attorneys for Leo Salomon, Jacques H. Hecht, Isidore M. Kastner and Pauline Hecht, as executors of the Last Will and Testament of Myer Hecht, deceased, and Pauline Hecht, individually, in this matter, and that an order of substitution be entered herein without notice.

Dated New York, Feb. 7, 1928.

Ehrich & Mencher, Attorneys for Executors of the Last Will and Testament of Myer Hecht, Deceased. Leo Salomon, Jacques H. Hecht, Pauline Hecht, Isidore M. Kastner, Executors of the Last Will and Testament of Myer Hecht, Deceased. Pauline Hecht, Individually.

[fol. 77] *Duly sworn to by Leo Salomon et al. Jurats omitted in printing.*

[fols. 78–79½] Certificate to foregoing paper omitted in printing.

[fols. 80–81½] Bond on writ of error for $500.00, approved and filed February 9, 1928, omitted in printing.

[fol. 82] In Court of Appeals of New York

In the Matter of the Transfer Tax Upon the Estate of Myer Hecht, Deceased

Petition for Writ of Error in Surrogates' Court—Filed Feb. 9, 1928

To the Honorable Benjamin N. Cardozo, Chief Judge of the Court of Appeals of the State of New York:

The petition of Leo Salomon, Jacques H. Hecht, Isidore M. Kastner and Pauline Hecht, as executors of the last will

and testament of Myer Hecht, deceased, and Pauline Hecht, individually, respectfully shows:

I. That on or about the 22nd day of November, 1927, the Court of Appeals of the State of New York made and entered a final order, judgment and decree herein, in favor of the State Tax Commission of New York and against your petitioners above named, and that thereafter, in accordance with the law and practice of said State of New York, the said final order, judgment and decree of the Court of Appeals and the original records in this cause were remitted to the Surrogates' Court of the County of New York, wherein they now remain, with directions to enter the said final order, judgment and decree and carry the same into execution, and that thereupon, and on or about the 15th day of December, 1927 the said final order, judgment and decree of the Court of Appeals was entered in the said Surrogates' Court in conformity with the directions of said Court of [fol. 83] Appeals, and was made the final order, judgment and decree of said Surrogates' Court as well as of the said Court of Appeals.

II. That in the said final order, judgment and decree, and the proceedings had in this cause, certain errors were committed to the prejudice of your petitioners Leo Salomon, Jacques H. Hecht, Isidore M. Kastner and Pauline Hecht, as executors of the last will and testament of Myer Hecht, deceased, and those whom they represent, including Pauline Hecht, individually, all of which will appear in more detail in the assignment of errors which is filed in this cause with this petition.

III. That said Court of Appeals of the State of New York is the highset court of said State of New York in which a decision in this suit and matter could be had, and that the said final order, judgment and decree entered in the said Surrogates' Court as aforesaid, is the final order, judgment and decree which can be made or entered in this matter.

IV. That a printed copy of the record in the said Court of Appeals is herewith submitted, together with a certified copy of the said final order, judgment and decree of said Court of Appeals, and a certified copy of the order of the Surrogates' Court of the County of New York making the

said final order, judgment and decree that of said Surrogates' Court as well as of said Court of Appeals. That said Court of Appeals did not render any opinion in this cause.

V. That this suit or cause was commenced in the Surrogates' Court of the County of New York by your said petitioners as executors as aforesaid, pursuant to the requirements of the laws of the State of New York, for the purpose of having ascertained and fixed, the amount of the transfer tax payable to the State of New York by the estate of said [fol. 84] Myer Hecht, deceased, which your petitioners as executors as aforesaid, represented; and that in the said suit, culminating in the final order, judgment and decree aforesaid, there was and is, duly drawn into question by your petitioners, the validity of a statute of the State of New York, to wit: Chapter 144 of the Laws of 1925 of the State of New York, amending Sections 230 and 241 of the Tax Law of the State of New York entitled "An Act to Amend the Tax Law, in Relation to the Transfer Tax on Contingent Remainders," on the ground of its being repugnant to and in violation of the Fourteenth Amendment to the Constitution of the United States, and that said decision of said Court of Appeals was in favor of the validity of said New York State statute.

Wherefore, Leo Salomon, Jacques H. Hecht, Isidore M. Kastner and Pauline Hecht, as executors of the Last Will and Testament of Myer Hecht, deceased, and Pauline Hecht, individually, pray that a writ of error from the Supreme Court of the United States may issue in their behalf to the Surrogates' Court of the County of New York, State of New York, and the Surrogates thereof, for the correction of errors and the reversal of the final order, judgment and decree so complained of, and that a copy of the record, proceedings and papers in this matter, duly authenticated, may be sent to the Supreme Court of the United States.

Dated New York, this 6th day of February, 1928.

Ehrich & Mencher, Attorneys for Petitioners. Office and Post Office address: 20 Broad Street, Borough of Manhattan, New York, N. Y.

[fol. 84½] [File endorsement omitted.]

[fol. 85] In Court of Appeals of New York

[Title omitted]

Assignments of Error in Surrogates' Court—Filed February 9, 1928

Now comes Leo Salomon, Jacques H. Hecht, Isidore M. Kastner, and Pauline Hecht, as executors of the Last Will and Testament of Myer Hecht, deceased, and Pauline Hecht, individually, by Messrs. Ehrich & Mencher, their attorneys, and in connection with their petition for a writ of error respectfully submit that in the record, proceedings, decision and final order, judgment and decree of the Court of Appeals of the State of New York and of the Surrogates' Court of the County of New York upon the remittitur from said Court of Appeals in the above entitled matter, there is manifest error in this, to wit:

First. That the Court erred in holding that Chapter 144 of the Laws of 1925 of the State of New York, being an Act entitled "An Act to Amend the Tax Law, in Relation to the Transfer Tax on Contingent Remainders" approved March 16, 1925, and Article 10 of the Tax Law of said State in so far as it is amended by said Act, are constitutional and are not in conflict with or in violation of Section (1) of the Fourteenth Amendment to the Constitution of the United States and particularly that portion of Section (1) of said Fourteenth Amendment which reads as follows: "Nor shall any state deprive any person of life, liberty or [fol. 86] property without due process of law," or that portion of Section (1) of said Fourteenth Amendment which reads as follows: "Nor (shall any State) deny to any person within its jurisdiction the equal protection of the laws."

Second. That the Court erred in refusing to hold that the said Act (L. 1925 Ch. 144) and the said Tax Law insofar as it is amended thereby, are unconstitutional and in conflict with and in violation of Section (1) of the Fourteenth Amendment to the Constitution of the United States, and particularly that portion of said Section (1) which reads as follows: "Nor shall any state deprive any person of life, liberty or property without due process of law", or that portion of said Section (1) which reads as follows: "Nor

(shall any state) deny to any person within its jurisdiction the equal protection of the laws".

Third. That the final order, judgment and decree herein is in conflict with and in violation of the provisions of Section (1) of the Fourteenth Amendment to the Constitution of the United States, and particularly that portion of said Section (1) which reads as follows: "Nor shall any state deprive any person of life, liberty or property without due process of law", or that portion of said Section (1) which reads as follows: "Nor (shall any state) deny to any person within its jurisdiction the equal protection of the laws."

Fourth. That the Court erred in refusing to hold that the said Act (L. 1925 Ch. 144) and said Tax Law insofar as it was amended thereby, are repugnant to, in conflict with, and in violation of the Fourteenth Amendment to the Constitution of the United States, in that the tax imposed thereunder upon the transfer of the estate of said decedent is measured by property which was never owned or transferred by said decedent either at the time of his death or at any other time.

[fol. 87] Fifth. That the Court erred in refusing to hold that the said Act (L. 1925 Ch. 144), and the said Tax Law insofar as it is amended thereby, are repugnant to, in conflict with, and in violation of the Fourteenth Amendment to the Constitution of the United States, in that the tax imposed thereunder upon the transfer of the estate of the decedent is not based upon the true value of the property transferred, but on the contrary upon a false value required to be placed thereon for the purposes of said tax.

Sixth. The Court erred in refusing to hold that the said Act (L. 1925, Ch. 144) and the said Tax Law insofar as it is amended thereby, are repugnant to, in conflict with, and in violation of the Fourteenth Amendment to the Constitution of the United States, in that the method of valuation prescribed thereunder is false, arbitrary and capricious, and not calculated to ascertain the true value of the property subject to the tax.

Seventh. That the Court erred in refusing to hold that the said Act (L. 1925 Ch. 144), and the said Tax Law inso-

far as it is amended thereby, are repugnant to, in conflict with, and in violation of the Fourteenth Amendment to the Constitution of the United States, in that the petitioners, as executors as aforesaid, and those whom they represent, including Pauline Hecht individually, are deprived thereunder of the opportunity to show the true value of the property transferred by the said decedent, upon the transfer of which the said tax is imposed.

Eighth. That the Court erred in refusing to hold that the said Act (L. 1925 Ch. 144), and the said Tax Law insofar as it is amended thereby, are repugnant to, in conflict with, and in violation of the Fourteenth Amendment to the Constitution of the United States, in that the tax imposed hereunder operates unequally upon persons within the same [fol. 88] class, and results in arbitrary and unfair discrimination in favor of one as against another member of the same class and in that under said statutes there are established classifications for the purpose of said tax which are based on supposed differences which bear no reasonable or just relation to the subject in respect to which such classifications are made.

Ninth. That the Court erred in refusing to hold that the said Act (L. 1925 Ch. 144), and the said Tax Law insofar as it is amended thereby, are repugnant to, in conflict with, and in violation of the Fourteenth Amendment to the Constitution of the United States, in that under the provisions of the said statutes the taxpayer is not allowed to discharge the tax thereby imposed in order to prevent the running of interest on such tax, and in that said statutes require the payment of interest upon the tax thereby imposed without reference to the actual time that the tax has remained unpaid, and in that under the said statutes one taxpayer is required to pay interest on his tax so that the State may recoup itself for the loss of interest on a tax payable by another taxpayer, the payment of which latter tax has been postponed by the State.

Tenth. That the Court erred in refusing to reverse the order appealed from.

Wherefore, the petitioners pray that said final order, judgment and decree may be reversed and annulled, and

for such other and further relief as may be proper in the premises.

Ehrich & Mencher, Attorneys for Petitioners. Office & Post Office address: 20 Broad Street, New York, N. Y.

[fol. 88½] [File endorsement omitted.]

[fol. 89] In Court of Appeals of New York

[Title omitted]

Order Allowing Writ of Error. Filed in Surrogates' Court February 9, 1928

The above entitled matter coming on to be heard upon the petition of Leo Salomon, Jacques H. Hecht, Isidore M. Kastner and Pauline Hecht, as executors of the last will and testament of Myer Hecht, deceased, and Pauline Hecht, individually, for a writ of error from the Supreme Court of the United States to the Surrogates' Court of the County of New York, State of New York, and the Surrogates thereof, and upon the examination of said petition and the record of said matter, and desiring to give the petitioners an opportunity to present to the Supreme Court of the United States the questions presented by the record in said matter, it is

Ordered, that a writ of error be and is hereby allowed from the Supreme Court of the United States to the Surrogates' Court of the County of New York, State of New York, and the Surrogates thereof.

Dated February 7, 1928.

Benjamin N. Cardozo, Chief Judge of the Court of Appeals of the State of New York.

[File endorsement omitted.]

[fols. 90 & 90½] Citation in usual form, showing service, filed February 9, 1928, omitted in printing.

[fol. 91] In Court of Appeals of New York

Writ of Error—Filed in Surrogates' Court February 9, 1928

United States of America, ss:

The President of the United States of America to the Honorable the Surrogates of the Surrogates' Court of the County of New York, State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of a final order, judgment and decree which is in the said Surrogates' Court upon a remittitur from the Court of Appeals of the State of New York before you, or one of you, being the highest court of law or equity of the said State in which a decree or decision could be had in the matter of the transfer tax upon the estate of Myer Hecht, deceased, wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, upon the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity; or wherein the title, right, privilege or immunity was claimed under the Constitution of the United States, and the decision was against the title, right, privilege or immunity especially set up or claimed under said Constitution, a manifest error hath happened to the great damage of Leo Salomon, Jacques H. Hecht, Isidore M. Kastner and Pauline Hecht, as executors of the last will and testament of Myer Hecht, deceased, and Pauline Hecht, individually, as by their petition appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings afore-[fol. 92] said, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, the 7th day of February, in the year of our Lord one thousand nine hundred and twenty-eight.

Abe Gilchriey, Clerk of the United States District Court, Southern District of New York. (Seal District Court of the United States, Southern District of N. Y.)

The foregoing writ is hereby allowed. Benjamin Meardoyo, Chief Judge of the New York Court of Appeals.

[fol. 92½] [File endorsement omitted.]

[fol. 93] In Surrogates' Court of New York County

[Title omitted]

Affidavit of No Opinion—Filed February 9, 1928

State of New York,
County of New York, ss:

Charles Angulo, being duly sworn, deposes and says: That he is an attorney at law and a member of the firm of Taylor, Blanc, Capron & Marsh, attorneys for the plaintiffs-in-error in the above entitled matter and is familiar with the proceedings had therein; that no opinion in the above entitled matter was rendered by the Court of Appeals of the State of New York in affirming the order of the Appellate Division of the Supreme Court of the State of New York, First Department, and that no opinion was rendered by the Surrogates' Court of the County of New York in rendering its order upon the remittitur from the said Court of Appeals.

Charles Angulo.

Sworn to before me this 20th day of February, 1928. C. G. C. Raphael, Notary Public, Kings County. Kings Co. Cl'k's No. 541. Reg. No. 9287. N. Y. Co. Cl'k's No. 651. Reg. No. 9474. Commission expires March 30, 1929.

[fol. 93½] [File endorsement omitted.]

[fol. 94] In Surrogates' Court of New York County

[Title omitted]

Stipulation re Transcript of Record—Filed February 21, 1928

It is hereby stipulated by and between the attorneys for the respective parties in the above entitled proceeding, that the papers to be transmitted to the Supreme Court of the United States, by the Clerk of the Surrogates' Court of the County of New York, State of New York, pursuant to a writ of error allowed therein by the Hon. Benjamin N. Cardozo, Chief Judge of the Court of Appeals of the State of New York, on February 7, 1928, and issued on that day by the Clerk of the United States District Court for the Southern District of New York, in the proceeding between said parties, are the following, and that this stipulation shall take the place of the praecipe required to be filed by counsel for the respective parties, under and pursuant to Rule 9 of the Rules of the Supreme Court of the United States:

First. The remittitur of the Court of Appeals to the Surrogates' Court of the County of New York, dated November 23, 1927, including therein the printed record used in the said Court of Appeals in said proceeding.

Second. The order on the remittitur of the said Court of Appeals, entered in the office of the Clerk of the Sur-[fol. 95] rogates' Court of the County of New York, on December 16, 1927.

Third. The petition for writ of error, assignment of errors, order of allowance of writ of error, bond and writ of error, filed with the Clerk of the Surrogates' Court of the County of New York, on February 9, 1928.

Fourth. The citation to the State Tax Commission of New York, defendants in error herein, dated February 7, 1928, filed with the Clerk of the Surrogates' Court of the County of New York, and served on said defendants in error on February 9, 1928.

Fifth. The affidavit of no opinion in the said Court of Appeals.

Sixth. The consent to the substitution of attorneys for plaintiffs in error and the order of substitution thereof.

Seventh. The present stipulation.

It is further stipulated that the Clerk of the Surrogates' Court of the County of New York may certify the transcript of record, together with all of the papers used in connection with the said writ of error without further formality.

Dated New York City, February 20th, 1928.

Taylor, Blanc, Capron & Marsh, Attorneys for Plaintiffs in Error. Charles A. Curtin, Attorney for Defendants in Error.

[fol. 95½] [File endorsement omitted.]

[fol. 96] In Surrogates' Court of New York County

Clerk's Certificate

State of New York,
County of New York, ss:

I, Martin G. McCue, Clerk of the Surrogates' Court of the County of New York, pursuant to a writ of error directed to the Honorable the Surrogates of the Surrogates' Court of the County of New York, State of New York, which said writ was allowed by the Honorable Benjamin N. Cardozo, Chief Judge of the Court of Appeals of the State of New York, and was issued by the Clerk of the United States District Court for the Southern District of New York, on the 7th day of February, 1928, do hereby certify the writing hereto attached to be a true, complete and perfect copy of the remittitur of the said Court of Appeals to the said Surrogates' Court of the County of New York, including therein the printed record used in the said Court of Appeals, the order on the remittitur of the said Court of Appeals, consent to substitution of attorneys for plaintiff in error and order of substitution thereof, and the bond on writ of error, in the proceedings entitled "In the Matter of the Transfer Tax upon

the Estate of Myer Hecht, deceased," as the same remains on file and on record in said matter in my office. That attached to said papers is the petition for writ of error, assignment of errors, order of allowance of writ of error, citation with admission of service thereof, writ of error, affidavit of no opinion and stipulation re transcript of record, all filed in the office of this Court, and the same are the originals thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Surrogates' Court of the County of New York, this 24th day of February, 1928.

Martin G. McCue, Clerk of the Surrogates' Court.
(New York Surrogate's Seal.)

[fol. 97] In Court of Appeals of New York

Court of Appeals,
State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany on the 22nd day of November, in the year of our Lord one thousand nine hundred and twenty seven, before the Judges of said Court.

Witness the Hon. Benjamin N. Cardozo, Chief Justice, presiding.

Wm. J. Armstrong, Clerk.

Remittitur—November 23, 1927

[fol. 98] In the Matter of the Transfer Tax upon the Estate of Myer Hecht, Dec'd

Be it remembered, That on the 1st day of July in the year of our Lord one thousand nine hundred and twenty seven Leo Salomon and others as Executors etc. and another the appellants in this cause, came here into the Court of Appeals by Ehrich & Mencher their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department and State Tax Commission the respondent in said cause afterwards appeared in said Court of Appeals by Charles A. Curtin its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid are hereunto annexed

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Charles Angulo of counsel for the appellants and by Mr. Seth T. Cole, of counsel for the respondent briefs filed by amici curiæ, and after due deliberation had thereon did order, and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same is hereby affirmed with costs.

And it was also further ordered, that the record aforesaid and the proceedings in this Court be remitted to the Surrogates' Court there to be proceeded upon according to law. [fol. 99] Therefore, it is considered that the said order be affirmed with costs, as aforesaid.

And, hereupon as well as the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Surrogates' Court, New York County before the Surrogates thereof according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in said Surrogates' Court before the Surrogates thereof, &c.

Wm. J. Armstrong, Clerk of the Court of Appeals of the State of New York.

Court of Appeals Clerk's Office, Albany

November 23, 1927.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Wm. J. Armstrong, Clerk. (Seal.)

State of New York,
County of New York, ss:

I, Martin G. McCue, Clerk of the Surrogates' Court of said county, do hereby certify that I have compared the foregoing copy of Order of Court of Appeals affirming Order of the Appellate Division of the Supreme Court in the Matter of the Transfer Tax upon the Estate of Myer

Hecht, deceased, with the original record thereof now remaining in this office, and have found the same to be a correct transcript therefrom and of the whole of such original record.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Surrogate's Court of the County of New York, this 28th day of January, in the year of our Lord one thousand nine hundred and twenty-eight.

Martin G. McCue, Clerk of the Surrogate's Court.
(Seal New York Surrogate's Court.)

[fol. 100] Supreme Court of the United States

Statement of Points to be Relied upon and Designation by Plaintiffs-in-Error of Parts of the Record to be Printed—Filed March 2, 1928

Now come Leo Salomon, Jacques H. Hecht, Isidore M. Kastner and Pauline Hecht, as executors of the last will and testament of Myer Hecht, deceased, and Pauline Hecht, individually, by Edward H. Blanc, their attorney, and state that they intend to rely upon the points as set forth in the assignment of errors filed herein in prosecution of their writ of error herein, and that the parts of the record to be printed herein shall be the entire transcript of the record as certified by the Clerk of the Surrogates' Court of the County of New York, State of New York.

Edward H. Blanc. Office and Post Office address: No. 22 William Street, New York City, N. Y.

Dated New York, Feb. 28, 1928.

[fol. 101] Service of copy of within is hereby admitted Feb. 29, 1928. Charles A. Curtin, Atty. for State Tax Com.

[fol. 102] [File endorsement omitted.]

Endorsed on cover: File No. 33,261. New York Surrogates' Court of New York County. Term No. 809. Leo Salomon, Jacques H. Hecht, Isidore M. Kastner, et al., etc., plaintiffs in error, vs. State Tax Commission of New York. Filed February 27th, 1928. File No. 33,261.

Nov. 28

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 80

NETTIE I. SIMONSON, ETTIE B. SIMONSON, AND FARMERS LOAN & TRUST COMPANY, ETC., PLAINTIFFS IN ERROR,

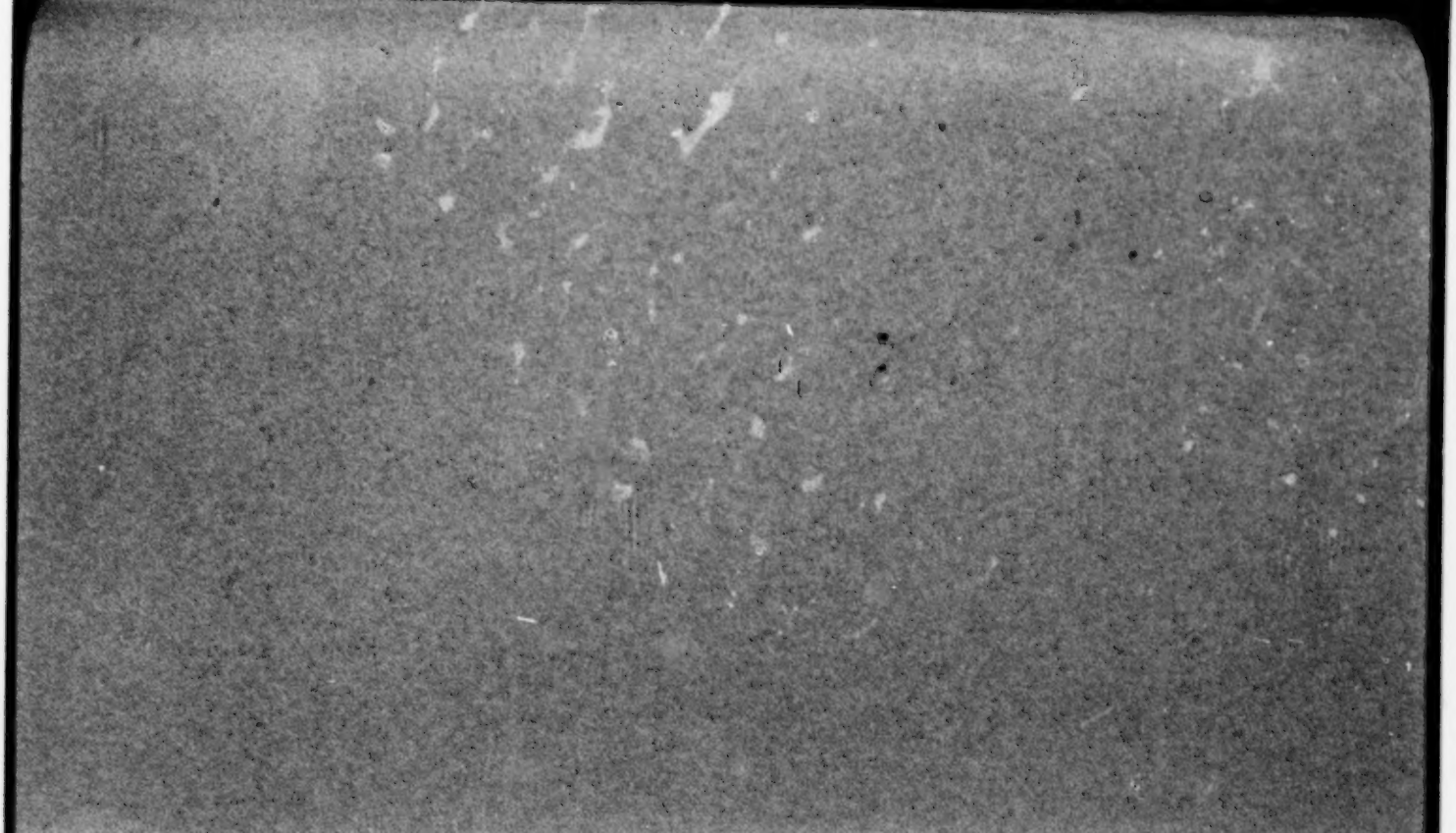
vs.

STATE TAX COMMISSION OF NEW YORK

IN ERROR TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK

FILED FEBRUARY 17, 1926

(33,262)



(33,262)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 80

NETTIE L. SIMONSON, ETTIE B. SIMONSON, AND FARMERS LOAN & TRUST COMPANY, ETC., PLAINTIFFS IN ERROR,

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STATE TAX COMMISSION OF NEW YORK

IN ERROR TO THE SURROGATES COURT OF NEW YORK COUNTY, STATE OF NEW YORK

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 28, 1928

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[fol. a]

IN SURROGATES' COURT OF NEW YORK COUNTY

CLERK'S CERTIFICATE

STATE OF NEW YORK,
County of New York, ss:

I, Martin G. McCue, Clerk of the Surrogates' Court of the County of New York, pursuant to a writ of error directed to the Honorable the Surrogates of the Surrogates' Court of the County of New York, State of New York, which said writ was allowed by the Honorable Benjamin N. Cardozo, Chief Judge of the Court of Appeals of the State of New York, and was issued by the Clerk of the United States District Court for the Southern District of New York, on the 7th day of February, 1928, do hereby certify the writing hereto attached to be a true, complete and perfect copy of the remittitur of the said Court of Appeals to the said Surrogates' Court of the County of New York, including therein the printed record used in the said Court of Appeals, the order on the remittitur of the said Court of Appeals, and the bond on writ of error, in the proceedings entitled "In the Matter of the Transfer Tax on the Estate of Albert Simonson, deceased," as the same remains on file and on record in said matter in my office. That attached to said papers are the petition for Writ of error, assignment of errors, order of allowance of writ of error, citation with admission of service thereof, writ of error, affidavit of no opinion and stipulation re transcript of record, all filed in the office of this Court, and the same are the originals thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Surrogates' Court of the County of New York, this 24th day of February, 1928.

Martin G. McCue, Clerk of the Surrogates' Court.
(New York Surrogate's Seal.)

[fol. b] IN COURT OF APPEALS OF NEW YORK

REMITTITUR—November 23, 1927

[fol. c] In the Matter of The Transfer Tax Upon the Estate of ALBERT SIMONSON, Dec'd.

Be it Remembered, That on the 21st day of June in the year of our Lord one thousand nine hundred and twenty-seven, Nettie I. Simonson and others, as Executors, the appellants in this cause, came here unto the Court of Appeals, by Cohen, Gutman & Richter, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department, And State Tax Commission, the respondents in said cause, afterwards in said Court of Appeals by Charles A. Curtin, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid are hereunto annexed.

[fol. d] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Abraham L. Gutman, of counsel for the appellants, and by Mr. Seth T. Cole, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Surrogates' Court, there to be proceeded upon according to law.

[fol. e] Therefore, It is considered that the said order be affirmed with costs as aforesaid. And hereupon, as well as the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Surrogates' Court, New York County, before the Surrogates thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Surrogates' Court, before the Surrogate thereof, &c.

Wm. J. Armstrong, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany

November 23, 1927.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Wm. J. Armstrong, Clerk. (Seal Court of Appeals, State of New York.)

[fols. f-i] Clerk's certificate to foregoing paper omitted in printing.

[fol. 1] In Supreme Court of New York, Appellate Division, First Department

In the Matter of the Transfer Tax on the Estate of Albert Simonson, Deceased; Nettie I. Simonson et al., as Executors, Appellants; State Tax Commission of New York Respondent

Statement under Rule 234

This proceeding was commenced by the filing of a petition of the Executors of decedent's estate to the Surrogates' Court of New York County to fix and assess a transfer tax upon the estate of the decedent.

The matter was duly referred to Maurice A. Stephenson, Esq., Appraiser, before whom Charles A. Curtin, Esq., appeared as attorney for the State Tax Commission, and Cohen, Gutman & Richter, Esqs., as attorneys for the Executors.

Such proceedings were had that a report was made to the Surrogates' Court by said Appraiser and upon said report an order was entered on the 24th day of August, 1926, fixing and assessing the tax upon the estate of the decedent. From said order an apepal was taken to the Surrogate of New York County, and upon said appeal an order was entered on the 15th day of October, 1926, denying the appeal and affirming the said order. From

this order denying the appeal and affirming the order, an appeal is taken to this Court.

There has been no change of parties or attorneys.

[fol. 2] In Surrogates' Court of New York County

In the Matter of the Transfer Tax on the Estate of Albert Simonson, Deceased

Notice of Appeal to Appellate Division

Sirs: Please take notice that the executors of the above named estate hereby appeal to the Appellate Division of the Supreme Court of the State of New York, First Department, from the order of the Surrogate of the County of New York heretofore made and entered herein on the 15th day of October, 1926, affirming the order theretofore made and entered on the 24th day of August, 1926, fixing and assessing the tax upon the transfer of the property of the said decedent under the law relating to taxable transfers of property and from each and every part of said order.

Dated October 18th, 1926.

Cohen, Gutman & Richter, Attorneys for Executors, 111 Broadway, New York City.

To Charles A. Curtin, Esq., Attorney for State Tax Commission; Clerk of the Surrogates' Court of the County of New York.

[fol. 3] In Surrogates' Court of New York County

[Title omitted]

Order Denying Appeal—Oct. 15, 1926

An appeal having been taken to this Court by the executors in the above named estate from the pro forma order entered in the Surrogates' Court on the 24th day of August, 1926, and said appeal having come on to be heard, and after hearing Cohen, Gutman & Richter, attorneys for the executors, and Charles A. Curtin, attorney for the State Tax Commission, in opposition, it is

Ordered and adjudged that the appeal be and the same is hereby denied, and the order fixing tax affirmed.

James A. Foley, Surrogate.

[fol. 4] In Surrogates' Court of New York County

[Title omitted]

Order Assessing Tax—Aug. 24, 1926

On reading the report filed on the 18th day of August, 1926, of Maurice A. Stephenson, the appraiser appointed by order of this Court dated the 1st day of July, 1926, and it appearing that the said decedent died on the 29th day of December, 1925, it is

Ordered and adjudged that the cash value of the property referred to in said report the transfer of which is subject to the tax imposed by the act relating to taxable transfers and the tax to which the transfers are liable are as follows:

	Amount received	Amount of exemption	Amount received	Taxable amount
Ettie B. Simonson	$120.721	$5,000	$115.721	$2,221.63
Nettie I. Simonson	120.721	5,000	115.721	2,221.63
Executors for the benefit of Persons of the 1% Class, Full Undiminished Value of above fund	320,083.37	0	$320,083.37	$9,553.33

John P. O'Brien, Surrogate.

[fol. 5] In Surrogates' Court of New York County

[Title omitted]

Notice of Appeal to Surrogate from Order Assessing Tax

Sirs: Please take notice that the executors of the above named estate are dissatisfied with the appraisal herein of the property of the above named decedent as made and set forth in the report of the appraiser filed herein on the 18th

day of August, 1926, and with the order fixing and assessing the transfer tax in respect to the transfer of the property of the said decedent made and entered herein on or about the 24th day of August, 1926, and hereby appeal to the Surrogate from the said appraisal and from the said order assessing the tax as aforesaid on the ground that the taxation of the remainder of the trust fund of $320,083.37, after the life estate therein granted, as its full undiminished value, is confiscatory, arbitrary and discriminatory, and constitutes a taking of property without [fol. 6] due process of law and without just compensation and is, therefore, in violation of the Constitutions of the State of New York and of the United States.

Dated New York, September 22nd, 1926.

Cohen, Gutman & Richter, Attorneys for Executors,
111 Broadway, New York, N. Y.

To Martin G. McCue, Esq., Clerk of the Surrogates' Court, County of New York; Charles A. Curtin, Esq., Attorney for State Tax Commission, 220 West 40th Street, New York, N. Y.

[fol. 7] In Surrogates' Court of New York County

[Title omitted]

Appraiser's Report

To the Surrogates' Court of the County of New York:

I, Maurice A. Stephenson, Transfer Tax Appraiser, having been designated by Hon. James A. Foley, Surrogate of the County of New York, by an order duly made and entered on the 1st day of July, 1926, to appraise the estate of the above-named decedent, pursuant to the provisions of the Law relating to taxable transfers of property, and the statutory notice by mail having been duly given herein to all the persons entitled thereto as provided in Section 230 of the Tax Law as appears by copy of such notice and affidavit of mailing thereof hereunto annexed, and having held an appraisal on the 10th day of August, 1926, at the office of the Transfer Tax Appraiser for the County of New York, and having heard the allegations and proofs

of the parties then and there appearing before me and [fol. 8] offering the same, and having given due consideration to the affidavits and other papers submitted herein, and having made due and careful inquiry into all the matters and things brought before me in this proceeding, do now make and file the following report:

First. I report that the decedent herein died a resident of the State of New York on the 29th day of December, 1925, leaving a Last Will and Testament, copy of which is hereunto annexed, which was duly admitted to probate by this Court on the 27th day of January, 1926, and that thereafter on the 27th day of January, 1926, Letters Testamentary upon the estate of the said decedent were duly issued by this Court to Ettie B. Simonson, 525 West End Avenue, New York City; Nettie L. Simonson, 525 West End Avenue, New York City; Farmers' Loan & Trust Co., 22 William Street, New York City, as executors.

Second. I further report the following appearances in this proceeding: Charles A. Curtin, Esq., Attorneys for State Tax Commission, 220 West 40th Street, New York City, Cohen, Gutman & Richter, Esqs., Attorneys for Executors, 111 Broadway, New York City.

[fol. 9] Third. I further report that I found the property left by the decedent herein or in which said decedent had any beneficial interest or appointed or transferred in contemplation of death, by decedent, to consist of the items set forth in the annexed affidavit for appraisal, and that the fair market value of each of the said items at the date of decedent's death is the amount set down by me opposite such items in the column designated "Value as appraised in this proceeding," and that the sums properly to be allowed as deductions herein for funeral expenses, expenses of administration, debts of decedent, etc., are the amounts set down by me after the several items claimed in the column designated "Allowed in this proceeding," as a result of which I find the said assets and deductions to be as shown in the following summary:

Assets

Schedule A—Real Estate	$350,000 00
Schedule B—Cash	12,966 43
Schedule C—Personal Effects	640 00
Schedule D—Mortgages, Notes and Accounts	0
Schedule E—Insurance	0
Schedule F—Stocks and Bonds	0
Schedule G—Partnerships or Business Interests	0
Schedule H—Gifts and Transfers	0
Schedule I—Powers of Appointment	0
Schedule J—Interest in other estates	0
Schedule K—Other property	0
Gross assets	$363,606 43

[fol. 10] Subject to Deductions as follows:

Schedule L—Funeral and Administration	$8,659 07	
Schedule M—Debts	1,855 15	
Schedule N—Other deductions	0	
Commissions	374 16	
Total deductions		$10,888 38
The total of all property passing upon the death of the decedent I appraise at		$352,718 05

Fourth. I further report all the beneficiaries entitled at the time of decedent's death to an interest in this estate pursuant to the provisions of Law, and of the said decedent's Last Will and Testament, the relationship of such persons to decedent, the amount of the share or interest of each, and whether such share or interest is taxable in this proceeding, to be as hereinafter set forth, all of said beneficiaries of full age and sound mind except as otherwise designated.

[fol.11] Appraiser's Report

Beneficiaries—Relationship	Amount of interest	Amount of exemption	Amount of interest taxable
Ettie B. Simonsin (Daughter):			
¼ Jewelry	$320.00		
Joint and surviving life estate in.... $340,578.15			
Less Trustees' Commissions 20,494.68			
$320,083.37			
Present Value.....	120,401.00		
	120,721.00	5,000.00	115,721.00
Leo B. Simonson (Son):			
Legacy	5,000.00	5,000.00	0.00
Felix A. Simonson (Son):			
Legacy	5,000.00	5,000.00	0.00
Federation of Jewish Charities:			
Bequest	1,000.00	1,000.00	0.00
Salem Fields Cemetery Society of the Temple Emanuel:			
Bequest	500.00	500.00	0.00
Nettie I. Simonson (Daughter):			
¼ Jewelry.....	320.00		
Joint and surviving life estate..... $340,578.05			
Less Trustees' Commissions (3).... 20,494.68			
$320,083.37			
Present Value.....	120,401.00		
	120,721.00	5,000.00	115,721.00
To Executors for the Benefit of Persons of the 1% Class:			
Full undiminished value of of above fund.....	320,083.37	0	320,083.37

Respectfully submitted,

Dated New York, N. Y. Maurice A. Stephenson, Appraiser.

[fol. 12] In Surrogates' Court of New York County

[Title omitted]

Order Designating Transfer Tax Appraiser—July 1, 1926

On reading and filing the petition of the Farmers' Loan & Trust Company, one of the executors of the estate of said decedent, I do hereby, pursuant to the requirement of

Section 230 of Article X of the Tax Law, direct Maurice A. Stephenson, Esq., one of the appraisers appointed by the State Tax Commission under said statute, to fix under Article X, Chapter 60, of the Consolidated Laws of 1909, and the Acts amendatory thereof and supplemental thereto, the fair market value of the property which was of the above-named decedent, to declare the value of such interest or interests therein as may be subject to the payment of the transfer tax, to declare exempt from such tax such interest or interests as he may find to be exempt, and to do such other thing or things in the premises as he may be authorized to do by virtue of his office under the said provision of law.

James A. Foley, Surrogate.

[fol. 13] In Surrogates' Court of New York County

[Title omitted]

Petition for Designation of Transfer Tax Appraiser

To the Surrogates' Court of the County of New York:

The petition of Farmers' Loan & Trust Company respectfully shows:

First. That your petitioner, Farmers' Loan & Trust Company, is one of the executors of the estate of Albert Simonson, deceased, and as such is interested in the estate of the said deceased.

Second. That the said decedent departed this life on the 29th day of December, 1925, at New York; that the said deceased was a resident of New York County.

Third. That letters testamentary on the estate of said deceased were, on the 27th day of January, 1926, issued to your petitioner, Nettie I. Simonson and Etta B. Simonson by the Surrogates' Court of the County of New York, and [fol. 14] that their post office addresses are Farmers' Loan & Trust Company, 22 William Street, New York, N. Y.; Nettie I. Simonson and Etta B. Simonson, 565 West End Avenue, New York.

Fourth. That, as your petitioner is informed and believes, the transfer of the property of said decedent, or some portion thereof or some interest therein, is or may be subject to the payment of the tax imposed by the law in relation to taxable transfers of property.

Fifth. That all persons who are interested in said estate and who are entitled to notice of all proceedings herein, and their post office addresses, are as follows: The State Tax Commission; Nettie I. Simonson, 505 West End Ave., New York, N. Y.; Ettie B. Simonson, 505 West End Ave., New York, N. Y.; Leo B. Simonson, 317 West 89th St., New York, N. Y.; Felix A. Simonson, 924 West End Ave., New York, N. Y., Carryl E. Simonson, 317 West 89th St., New York, N. Y.; Albert C. Simonson, 317 West 89th St., New York, N. Y.; Federation of Jewish Charities, 114 Fifth Ave., New York, N. Y.; Salem Fields Cemetery Society of Temple Emanuel, 775 Jamaica Ave., Brooklyn, N. Y.

[fol. 15] That all the above named are of full age and sound mind except Carryl E. Simonson and Albert C. Simonson.

That the gross value of the estate of the decedent, wherever situated, is more than $10,000.

That no previous application has been made for an order granting the relief prayed for in this petition.

That there are no persons other than those herein mentioned, interested in this proceeding.

Wherefore your petitioner prays that you will designate an appraiser, as provided by law, to fix, under Article X, Chapter 60, of the Consolidated Laws of 1909, and the Acts amendatory thereof and supplemental thereto, the fair market value of the property which was of the above-named decedent, to declare the value of such interest or interests therein as may be subject to the payment of the transfer tax, to declare exempt from such tax such interest or interests as he may find to be exempt, and to do such other thing

or things in the premises as he may be authorized to do by virtue of his office under the said provision of law.

Dated New York, June 30th, 1926.

Farmers' Loan & Trust Company, Petitioner, by W. A. Duncan, Vice-President.

[fol. 16] *Duly sworn to by Wm. A. Duncan. Jurat omitted in printing.*

[fol. 17] In Surrogates' Court of New York County

[Title omitted]

Affidavit and Schedules

State of New York,
County of New York, ss:

Nettie I. Simonson, Ettie B. Simonson, Farmers' Loan & Trust Company, executors of the estate of the above-named decedent, being duly sworn in this proceeding for the determination of the tax, if any, to be paid upon the assets of the said estate under the Law in Relation to Taxable Transfers of Property, deposes and says that as such executors deponents are personally familiar with affairs of the said estate, the property constituting the assets thereof, their fair market value, and the debts, expenses and charges properly allowable as deductions therefrom, and makes the following return:

General Information

1. Date of death: December 29th, 1925.

2. Resident of New York County.

[fol. 18] 3. Did the decedent leave a will? Yes.

4. Letters of administration, testamentary, were issued on January 27th, 1926, by the Surrogates' Court of New York County.

5. The names and post office addresses of the executors are: Ettie B. Simonson, 525 West End Ave., New York; Nettie I. Simonson, 525 West End Ave., New York; Farmers' Loan & Trust Co., 22 William Street, New York.

Property in the Estate

Schedule A—Real Estate:

6. Did the decedent at the time of death own any interest in real estate located within the State of New York, individually or jointly? Yes.

Schedule B—Cash:

7. Did the decedent at the time of death own any cash or have any money on deposit individually or jointly? Yes.

Schedule C—Personal Effects:

8. Did the decedent at the time of death own any wearing apparel, jewelry, silverware, pictures, books, works of art, household furniture, horses or other live stock, carriages, automobiles, boats, or any other personal chattels of whatever kind or nature, including leases on real estate, wheresoever located? Yes.

[fol. 19] Schedule D—Mortgages, Notes and Accounts:

9. Did the decedent at the time of death own any interest in bonds or mortgages, notes or accounts receivable, individually or jointly? No.

Schedule E—Insurance:

10. Was any life insurance receivable by the executor? No.

Schedule F—Stocks and Bonds:

11. Did the decedent at the time of death own any stocks or bonds or rights to subscribe thereto? No.

Schedule G—Partnership or Business Interests:

12. Did the decedent at the time of death own any interest in a partnership or an unincorporated business? No.

Schedule H—Gifts and Transfers:

13. (a) Did the decedent, during the period within two years prior to his death, make any transfer of property by

way of gift or without a fair consideration in money or money's worth? No.

(b) Did the decedent, at any time prior to two years before his death, make any transfer or create any trust in contemplation of or intended to take effect at or after death or in which he reserved to himself a life interest, without consideration? No.

(c) Were any trusts created by the decedent in existence at the time of death? No.

[fol. 20] (d) Did the decedent create any trust in which he had solely or with another the power of revocation? No.

Schedule I—Powers of Appointment:

14. Did the decedent have any power of appointment of property in any other estate? No.

Schedule J—Interest in Other Estates:

15. (a) Did the decedent at the time of death own any interest in any other estate? No.

(b) Did any remainder or reversion fall in or vest in possession or enjoinment by reason of the decedent's death? No.

Schedule K—Other Property:

16. Did the decedent at the time of death own any miscellaneous property not included or accountable under any other schedule? No.

Deductions

Schedule L—Funeral and Administration Expenses:

17. Itemize the funeral expenses and administration expenses in Schedule L, following the instructions for that schedule.

Schedule M—Debts:

18. Itemize the debts of decedent in Schedule M, following the instructions for that schedule.

Schedule N—Other Deductions:

19. Itemize in Schedule N all items claimed by the administrator executor as proper deductions herein and not [fol. 21] included in prior schedules, following the instructions for that schedule.

Schedule O—Beneficiaries:

20. Give in Schedule O a statement of the names of all persons beneficially interested in the estate, the nature of their respective interests, etc., following the instructions for that schedule.

Did any of the beneficiaries named in the decedent's will, if any, die prior to the decedent?

If the answer is "yes" designate in Schedule O which beneficiary died prior to the decedent and show his survivors, and the relationship of such survivors to the decedent.

General Affidavit

21. Deponent states that he has made a due and diligent search for property of every kind, nature and description left by the decedent, and has been able to discover only that set forth in the schedules accompanying this return and that no information of any other property of the decedent has come to the dependent's knowledge, and that the deponent verily believes the decedent left no property except as herein set forth; that Schedule A sets forth all the real estate in which the decedent at the time of death had any interest either individually or jointly with another; that Schedule B shows all cash or money which the decedent had on hand or on deposit, individually or jointly; that Schedule C shows all the personal effects, wearing apparel, jewelry, silverware, pictures, books, works of art, household furniture, horses or other live stock, carriages, automobiles, boats or any other personal chattels of whatever kind and nature, including leases on real estate wherever [fol. 22] located; that Schedule D sets forth all mortgages held by the decedent and all claims due and owing to the decedent at the time of death, and all promissory notes or other instruments in writing for the payment of money in which the decedent died possessed; that Schedule E sets

forth any and all life insurance payable to the estate; that Schedule F sets forth all the corporate stocks, bonds and other securities owned by the decedent at the time of death; that Schedule G sets forth the interest of the decedent at the time of death in any co-partnership or business; that Schedule H sets forth all property wheresoever situated, of which the decedent at any time made any grant, bargain sale or gift in contemplation of death, or intended to take effect in possession or enjoyment at or after the death of the decedent, and all the transfers made within two years prior to the death without a valid and adequate consideration, and all trusts in which the decedent had solely or with another the power of revocation, and that the decedent made no gifts or transfers except as stated therein; that Schedule I sets forth all property over which the decedent had a power of appointment, whether such power was exercised or not; that Schedule J sets forth the interest of the decedent in any estate of another; that Schedule K sets forth any and all property owned by the decedent in which he had any right or interest whatsoever which was not set forth in the preceding schedules; that the deponent has carefully read the instructions printed on this form and that all the answers contained therein are in accordance with such instructions; that to the best of deponent's knowledge and belief the value shown for each item of property [fol. 23] listed herein is the actual and full value at the time of decedent's death, and that the debts, expenses and charges entered herein as deductions from the gross estate are correct and legally allowable, and are not contested by the estate except as stated in the schedules.

22. The deponent further states that wherever in any part of this return or in any schedule the words "none" or "no" have been written, or wherever such schedule or any query has been left blank, such word or omission is to be taken as equivalent to an affirmative allegation by deponent that the decedent left no property of any kind to which the schedule relates.

Nettie I. Simonson, Ettie B. Simonson, M. E. Cardozo.

Severally sworn to before me this 18th day of May, 1926. Bessie Aaronson, Notary Public, Kings County. Clerk's No. 39. Register's No. 8030. N. Y. Co. Clerk's No. 36. Reg. No. 8027. Commission expires March 30, 1928. (Seal.)

Sworn to before me by M. E. Cardozo this 4th day of June, 1926. Bessie Aaronson, Notary Public, Kings County. Clerk's No. 39. Register's No. 8030. N. Y. Co. Cl'k's No. 36. Reg. No. 8027. Commission expires March 30, 1928.

[fol. 24]

Schedule A

Plot of land and six story and basement business building situated on the west side of Fifth Avenue north of 36th Street, having a frontage of twenty-seven (27) feet seven and one-half (7½) inches on Fifth Avenue, the southerly line being one hundred and twenty-five (125) feet and the northerly line one hundred twenty (120) feet, and known as No. 398 Fifth Avenue; deed to said premises recorded in the office of the Register of New York County on the 10th day of November, 1908, in liber 142 of conveyances, page 432; said property subject to a mortgage of $200,000, which mortgage expires November 1st, 1927	$350,000 00

Schedule B

Cash	$12,966 43

Schedule C

Jewelry	$640 00

Schedule D

None.

Schedule E

None.

[fol. 25] **Schedule F**

None.

Schedule G

None.

Schedule H

(See statement annexed.)

Schedule I

None.

Schedule J

None.

Schedule K

None.

[fol. 26] **Schedule L**

Funeral Expenses:	
Charles N. Pollak, undertaker	$857.40
Rev. Simon Schlager	25.00
Levy Bros., death notices, etc.	16.48
Administration Expenses:	
Clerk's fees filing petition, probate of Will	10.00
Certificates of letters testamentary	1.50
Certified copies of orders and miscellaneous expenses	8.69
Bannon & Shannon Co., appraisal of jewelry	35.00
Bannon & Shannon Co., appraisal	75.00
Friend-Wiener Donohue Advertising Co. Inc., publishing notice to creditors	90.00
Brown, Wheelock, Harris, Vought & Co., appraisal real estate	40.00
Executors' commissions, estimated (3)	21,876.36
Attorneys' fees, estimated	7,500.00
Total	$30,535.43

[fol. 27]

Schedule M

Debts:

Consolidated Gas Company	$15 18
P. M. Everts, drugs	24 24
New York Telephone Company	7 73
Dr. J. E. Reinthaler, professional services	308 00
Liability under lease of apartment, premises No. 525 West End Ave., N. Y., lease expires October 1st, 1927, at $5,200 a year	1,500 00
Total	$1,855 15

Schedule H

The decedent within two years prior to his death executed and delivered to his daughters a bill of sale of all of his furniture and personal effects.

That long prior to the execution and delivery of the said bill of sale, the decedent gave to his daughters all of his furniture and personal effects. The executors claim that this gift was not made by decedent in contemplation of or to take effect at his death.

The value of the furniture, etc., at the time of decedent's death was $2,808.55.

[fol. 28]

Schedule O

Name	Address	Relationship	Interest
Ettie B. Simonson	525 West End Ave. New York, N. Y.	Daughter	½ jewelry and household effects and life beneficiary in ½ res. estate.
Nettie I. Simonson	525 West End Ave., New York, N. Y.	Daughter	½ jewelry and household effects and life beneficiary in ½ res. estate.
Leo B. Simonson	317 West 89th St. New York, N. Y.	Son	$5,000.
Felix A. Simonson	924 West End Ave. New York, N. Y.	Son	$5,000 and a contingent interest in ¼ res. estate.
Federation of Jewish Charities	114 Fifth Ave. New York, N. Y.		$1,000.
Salem Fields Cemetery Society of the Temple Emanuel	775 Jamaica Ave. Brooklyn, N. Y.		$500.

Carryl E. Simonson	317 West 89th St. New York, N. Y.	Granddaughter	Contingent interest in residuary estate subject to terms of the Will.
Albert C. Simonson	317 West 89th St. New York, N. Y.	Grandson	Contingent interest in residuary estate subject to terms of the Will.

[fol. 29] In Surrogates' Court of New York County

[Title omitted]

Affidavit Appraising Real Property

State of New York,
County of New York, ss:

Francis K. Stevens, being duly sworn, deposes and says that he is Vice-President and an appraiser in charge of appraisals of Brown, Wheelock, Harris, Vought & Co., Inc., a corporation of the State of New York, doing a general real estate business and appraising, having a main office for the transaction of business at No. 14 Wall Street, in the City of New York;

That he has been actively engaged in the business of real estate and appraising of property in New York City for twenty-five years last past;

Deponent further states that at the request of The Farmers' Loan & Trust Company, he made an appraisal of the property known as No. 398 Fifth Avenue, New York City, being a plot of land situated on the west side of Fifth Avenue, 73 feet north of 36th Street, having a frontage of 27 feet, 7½ inches on Fifth Avenue, the southerly line being 125 feet and the northerly line 120 feet, the rear line being irregular, on which there stands a six story and basement business building, which property is leased until 1931 at [fol. 30] $38,000 net, the lessee having the right to two renewals of 21 years each at a rental to be based on 4½% of the value of the land and building, and valued the same, subject to this lease, as of December 29th, 1925, at Five Hundred and Fifty Thousand ($550,000) Dollars;

That he made this appraisal with the full knowledge that the property was assessed for the purpose of taxation for the year 1925 at $505,000.

Deponent further states that he considers this lease with its renewals of 4½%, a distinct detriment to the value of the property, and he is convinced from his knowledge of sales and rentals of property in this immediate neighbor-

hood that the fair market value of this property, subject to the lease, is as he has valued it.

Francis K. Stevens.

Sworn to before me this 3rd day of March, 1926. Carl W. Schwenk, Notary Public, Queens County, No. 3688. Certificate filed in New York Co. No. 797. Register's Office New York Co. No. 7639. My commission expires March 30, 1927. (Seal.)

[fol. 31] In Surrogates' Court of New York County

[Title omitted]

Affidavit and Appraisal of Jewelry

State of New York,
County of New York, ss:

Thos. J. Bannon, being duly sworn, deposes and says:

That he is one of the firm of Bannon-Shannon Co., Appraisers of Real and Personal Property, with offices located at 99 John Street, in the City of New York and Borough of Manhattan.

That he has had many years experience in appraising Personal Property of the character described in the annexed Schedule and has bought and sold Jewelry as found herein.

That at the request of the attorneys herein he has, with the assistance of Robert Stoll, appraised the Personal Property in the annexed Schedule at its true and fair market [fol. 32] value as of date of the decedent's death, December the 29th, 1925.

Thos. J. Bannon.

Sworn to before me this 8th day of February, 1926. E. M. Shannon, Commissioner of Deeds. N. Y. County Clerk's No. 225. N. Y. County Register's No. 27091. Expires March 31, 1927.

Personal Property Contained in Safe-Deposit Box at Farmers Loan & Trust Co. at 9 E. 38 Street, N. Y. C.

4 Vest buttons, platinum edge, pearl setting 1 Pair of link cuff buttons, platinum edge, pearl setting	$50 00
1 Oriental pearl and diamond cluster scarf pin	65 00
1 Diamond gypsy ring, 7sK	150 00
3 Diamond shirt studs	375 00
Totals for property contained in box at the Farmer's Loan & Trust Co., 9 E. 38 Street, New York City	$640 00

[fol. 33] In Surrogate's Court of New York County

[Title omitted]

Affidavit of Ages of Trust Beneficiaries

State of New York,
County of New York, ss:

Leo Simonson, being duly sworn, deposes and says: I am the brother of Nettie I. and Ettie B. Simonson. They are twin sisters and were born on September 25th, 1880. My father died on the 29th day of December, 1925. My sisters are at present travelling in Europe.

Leo B. Simonson.

Sworn to before me this 16th day of July, 1926.
Max C. Gavies, Notary Public, New York Co., = 18.
(Seal.)

[fol. 34] In Chambers of the Surrogates' Court of New York County

Estate of Albert Simonson, Deceased

Request to Superintendent of Insurance for Value of Life Estates

Date of Death: Dec. 29th, 1925.

New York, July 20th, 1926.

Dear Sir: In pursuance of Chapter 483, Laws of 1885, and the acts amendatory thereof and supplemental thereto, you are hereby requested to determine and ascertain the values of the following Estates, Annuities and Interest.

Name, Ettie Simonson; Age, 45; Legacy or Estate: Joint and surviving life estate in—Value or Amount, $320,083.37.

Name: Nettie Simonson; Age, 45; Legacy or Estate: Joint and surviving life estate in—Value or Amount, $320,083.37.

P. V. of each $120,401.

Wanted: Present value.

Yours respectfully, Maurice A. Stephenson, Esq., Appraiser.

To the Superintendent of Insurance Department, State of New York.

Return to Transfer Tax Bureau, 220 W. 40th St., New York City.

Attention of Miss McGraw.

[fol. 35] In Surrogate's Court of New York County

Estate of Albert Simonson, Deceased

Return of Superintendent of Insurance Stating Value of Life Estates

State of New York Insurance Department, Albany

July 21, 1926.

Dear Sir: In reply to your application of July 20th, I hereby certify to the present values requested as follows:

Name, Ettie Simonson; Legacy, Joint and surviving life estate in $320,083.37—Present Value Dec. 29, 1925, $120,401.

Name, Nettie Simonson; Legacy, Joint and surviving life estate in $320,083.37—Present Value Dec. 29, 1925, $120,401.

Yours very truly, James a Beha, Superintendent.

To Maurice A. Stephenson, Esq., Appraiser, New York County, New York City, N. Y.

Mailed to Managing Clerk, Transfer Tax Bureau, 220 W 40th Street, New York City.

Attention of Miss McGraw.

[fol. 36] In Surrogates' Court of New York County

Decedent's Last Will and Testament

I, Albert Simonson, of the City of New York, declare this to be my Last Will and Testament, hereby revoking all former wills:

First

I direct my executors hereinafter named to pay, as soon as conveniently after my death, all of my just debts including funeral and testamentary expenses.

Second

All of my jewelry, furniture and household effects, I give to my two daughters, Ettie B. Simonson and Nettie I. Simonson, share and share alike.

Third

I give to each of my sons, Leo B. Simonson and Felix A. Simonson, the sum of Five Thousand Dollars ($5,000.00).

I make no further provision for said sons herein, not that I love them any less than my daughters, but because I have already given to them my business and my primary object must be to care for my daughters during their lives.

Fourth

I give to the Federation of Jewish Charities in the City of New York the sum of One Thousand Dollars ($1,000.00). [fol. 37] I give to Salem Fields Cemetery Society of the Temple Emanuel the sum of Five Hundred Dollars ($500.00) to apply the income in keeping my plot in good order.

Fifth

All of the rest of my property, real and personal, I give and devise unto my executors hereinafter named, in trust nevertheless, to invest the same and to pay the net rents and income thereof to my daughters, Ettie B. Simonson and Nettie I. Simonson, during their lives in equal shares, and upon the death of either daughter, to pay the entire net rents and income thereof, to my surviving daughter for the balance of her life. Upon the death of both daughters, my said trustees shall pay and divide the principal to and among my grandchildren in such manner that the issue of each of my children shall together take one portion. If my son Felix shall not have any issue living at the time of the death of the survivor of my daughters as aforesaid but shall himself be alive, then he, Felix, shall receive one portion in the division of said principal.

In all cases the issue of any deceased grandchild shall take the share of its parent.

I declare that my son Leo is the only one who now has issue, it is my intention that his issue shall together take one portion of said principal, and similarly the issue of any other child shall take one portion; but that if my son Felix shall not have any issue living at the time of the death of my surviving daughter but shall himself be still living, then he shall taken an equal portion instead of his issue.

[fol. 38] Sixth

I direct that all inheritance and transfer taxes shall be paid out of the capital of my estate and not charged against any legacy, absolute or in trust.

Seventh

I direct that the entire income of each trust legacy shall be paid to the beneficiary of the trust without deduction

for amortization, and my executors shall not be liable for any depreciation in value of any securities in consequence of their being exchanged or redeemed at par at maturity or for any other reason.

Eighth

I empower my said executors to sell, at public or private sale, exchange or otherwise dispose of the whole or any part of my real or personal property, including any real estate acquired by them after my death, in such manner and upon such terms as to credit or otherwise as they, in their discretion may deem best, with power to accept purchase money mortgage or mortgages for the whole or any part of the purchase or exchange price; also to mortgage, lease, alter, repair or improve the same as to them may deem expedient. I authorize my said executors to lease real estate for a period of twenty-one years with renewals, in their discretion.

[fol. 39] Ninth

I authorize my executors to retain any investments made by me; and also authorize them to invest any funds directed to be held in trust in first mortgages upon real estate in the City of Greater New York, no loan to exceed two-thirds of the value of the mortgaged premises as appraised by some competent real estate appraiser of said City; and also in mortgages guaranteed by a title or mortgage insurance company, or in guaranteed mortgage certificates thereof, provided the said company has been in business in said City for at least five years preceding the time of investment and shall have a capital and surplus of at least One Million Dollars ($1,000,000.00); and also in bonds and securities of the United States Government or any State, City or County that shall not, during the period of ten years prior to the date of investment, have defaulted in the payment of principal and interest on its bonded indebtedness; and also in mortgage bonds of any railroad that shall, for a period of at least five years prior to the date of investment, have paid interest on its next junior mortgage or dividends upon any of its stock.

Tenth

I authorize my said executors to treat the separate trust funds created in this, my Will, as one common fund for the purpose of investment.

Eleventh

I authorize my said executors in case of default in interest or principal of any securities to deposit the same [fol. 40] subject to the terms of any protective or reorganization agreement and accept new or substitute securities in place thereof and make the necessary payments to obtain the same.

Twelfth

I authorize my said executors in the distribution of my estate to allot in kind or appropriate any part of my estate to the payment of any bequest or devise with power conclusively to determine the value of the property so allotted.

Thirteenth

I authorize my said executors to advance from time to time to my daughters out of the principal of the trust fund created for their benefit such sum or sums as they deem proper, but the total of the advances to the two daughters together shall not exceed in amount one third of the principal of said trust fund, and such advances shall be made only in times of sickness or other important emergency. Any advances that may be so made shall be deducted without interest from the share of the issue of such daughter upon the final distribution of my estate.

Fourteenth

I appoint as executors of and trustees under this Will my daughters, Ettie B. Simonson and Nettie I. Simonson and Farmers Loan & Trust Company of the City of New York. I direct that wherever the term "executors" is employed in this Will, it shall be construed to mean trustees [fol. 41] wherever the context may require it, and shall be deemed to include in the sense both of executors and trustees only such of the above named as shall qualify upon the

probate of this Will and the survivor or survivors of them, their successor and successors, whether appointed under the power of appointment hereinafter conferred or by the court. I authorize my executors and trustees for the time being, in their discretion, to add to their number or to fill any vacancy in their number, whether such vacancy be caused by failure to qualify, resignation, death before or after me, or otherwise, such appointment to be in writing and acknowledged and to be filed in the office of the Surrogate or the Register of the County of New York, and such appointee shall thereupon possess the same rights and powers as if originally named herein as one of my executors and trustees. I further direct that every right or duty conferred or imposed upon my said executors and trustees shall be exercised by a majority thereof, said Trust Company being one of the majority, with the same effect as if all had joined therein. I further direct that none of my executors or trustees, whether originally named herein or appointed under the power of appointment herein conferred, shall be required to give any security for the faithful discharge of her or its duties either upon the qualification or during the administration of my estate, and that each of said executors and trustees shall be chargeable only with her or its own respective acts and wilful defaults.

In witness whereof, I have unto this, my Last Will and Testament, set my hand and seal in the City of New York [fol. 42] this 6th day of November Nineteen hundred and twenty-four (1924).

Albert Simonson. (L. s.)

Subscribed, sealed, published and declared by Albert Simonson, the testator, as and for his Last Will and Testament in the presence of us and each of us, who, at his request, in his presence, and in the presence of each other have hereunto subscribed our name and witnesses the day and year last above written.

Abraham L. Gutman, residing at 166 W. 87th Street, New York City. Frank F. Kirkpatrick, residing at Mt. Kisco, New York.

IN SURROGATES' COURT OF NEW YORK COUNTY

MEMORANDUM OF SURROGATE

(N. Y. L. J., Oct. 9, 1926)

FOLEY, S.:

Estate of Albert Simonson—Appeal denied. Matter of Hecht, 127 Misc. 211.

[fol. 43] AFFIDAVIT OF NO OPINION

STATE OF NEW YORK,
County of New York, ss:

ABRAHAM L. GUTMAN, being duly affirmed, deposes and says: that he is one of the attorneys for the executors of the Estate of Albert Simonson, deceased; that no opinion was rendered by the Surrogate in determining the appeal herein, other than the foregoing memorandum.

Abrm. L. Gutman.

Affirmed before me this 28th day of October, 1926. Wm. V. Goldberg, Notary Public, New York County. Clerk's No. 131, Register's No. 7006. Certificate filed in King's County. Clerk's No. 2, Register's No. 7001. Certificate filed in Bronx County. Clerk's No. 35, Register's No. 2799. Commission expires March 30, 1927.

[fol. 44] STIPULATION WAIVING CERTIFICATION

It is hereby stipulated that the foregoing are true copies of the Notice of Appeal to the Appellate Division, the order of Surrogate James A. Foley appealed from, and all the papers used by the Surrogate in making said order, and the whole thereof now on file in the office of the Clerk of the Surrogate's Court for the County of New York, and that certification thereof is hereby waived.

Dated New York, October 29, 1926.

Cohen, Gutman & Richter, Attorneys for Appellants.
Charles A. Curtin, Attorney for Respondent.

[fol. 45] In Supreme Court of New York, Appellate Division

[Title omitted]

Order of Affirmance—March 4, 1927

An appeal having been taken to this Court by the Executors from an order of the Surrogates' Court of the County of New York, entered in the Surrogates' Court on the 15th day of October, 1926, affirming an order entered on [fol. 46] the 24th day of August, 1926, fixing transfer tax, and said appeal having been argued by Mr. Abraham L. Gutman, of counsel for the appellant, and by Mr. Seth T. Cole, of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered and adjudged that the order so appealed from be and the same is hereby affirmed with costs.

Enter.

V. J. D., J. S. C.

In Surrogates' Court of New York County

[Title omitted]

Order on Remittitur—March 30, 1927

Nettie I. Simonson et al., executors of the Last Will and Testament of Albert Simonson, deceased, having appealed to the Appellate Division of the Supreme Court of the [fol. 47] State of New York for the First Department from the order of the Surrogates' Court of the County of New York, entered on the 15th day of October, 1926, affirming the order theretofore made and entered on the 24th day of August, 1926, fixing and assessing the tax upon the transfer of the property of said decedent under the law relating to taxable transfers of property, and the said appeal having been duly argued in the said Appellate Division of the Supreme Court of the State of New York, and after due deliberation the said Appellate Division of the Supreme Court of the State of New York having directed that the order so

appealed from be affirmed with costs and disbursements, and having remitted the proceedings herein to this Court to be proceeded upon according to law,

Now, upon reading and filing the remittitur from the Appellate Division of the Supreme Court of the State of New York for the First Department and upon motion of Charles A. Curtin, attorney for the State Tax Commission, respondent, it is

Ordered that the said order of the Appellate Division of the Supreme Court of the State of New York for the First Department be and the same is made the order of this Court; and it is

Further ordered that pursuant to the aforesaid order, the State Tax Commission of the State of New York recover from the estate of Albert Simonson, deceased, the sum of $66.80 costs and disbursements as taxed.

James A. Foley, Surrogate.

[fol. 48] In Supreme Court of New York, Appellate Division

[Title omitted]

Order Granting Leave to Appeal to the Court of Appeals—April 29, 1927

The above-named executors-appellants having moved for leave to appeal to the Court of Appeals from the order of this Court entered herein on the 4th day of March, 1927,

[fol. 49] Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Abraham L. Gutman in support of said motion, and the affidavit of Charles A. Curtin in opposition thereto, and after hearing Mr. Abraham L. Gutman for the motion and Mr. Charles A. Curtin opposed,

It is hereby ordered that the said motion be and the same hereby is granted, and this Court hereby certifies that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals.

Enter.

V. J. D., J. S. C.

[fol. 50] In Surrogates' Court of New York County

[Title omitted]

Notice of Appeal to Court of Appeals

Sirs: Please take notice that pursuant to the leave granted by the Appellate Division of the Supreme Court, First Judicial Department, in the above-entitled action in an order made and filed in the office of the Clerk of that Court on the 29th day of April, 1927, the above-named executors hereby appeal to the Court of Appeals from the order of the Appellate Division of the Supreme Court for the First Department entered in the office of the Clerk of said Appellate Division on the 4th day of March, 1927, affirming an order of the Surrogate of New York County entered in the office of the Clerk of the Surrogates' Court [fol. 51] of New York County on the 15th day of October, 1926, and from the order entered in the office of the Clerk of the Surrogates' Court of New York County on the 30th day of March, 1927, on the remittitur of the said Appellate Division, and the said executors appeal from each and every part of said orders as well as from the whole thereof.

Dated May 16th, 1927.

Yours, etc., Cohen, Gutman & Richter, Attorneys for Executors-Appellants. Office & P. O. address: 74 Trinity Place, New York City.

To Charles A. Curtin, Esq., Attorney for Respondent, 220 W. 40th Street, New York City; Martin G. McCue, Esq., Clerk of the Surrogates' Court of New York County.

[fol. 52] In Surrogates' Court of New York County

[Title omitted]

Notice of Appeal to Court of Appeals

Sirs: Please take notice that the above-named executors hereby appeal to the Court of Appeals from the order of affirmance in the above-entitled action entered in the office

of the Clerk of the Appellate Division of the Supreme Court for the First Department on the 4th day of March, 1927, affirming an order of the Surrogate of New York County entered in the office of the Clerk of the Surrogates' Court of New York County on the 15th day of October, 1926, and from the order entered in the office of the Clerk of the Surrogates' Court of New York County on the 30th [fol. 53] day of March, 1927, on the remittitur of the said Appellate Division, and the said executors appeal from each and every part of said orders as well as from the whole thereof.

Dated New York City, May 16th, 1927.

Yours, etc., Cohen, Gutman & Richter, Attorneys for Executors-Appellants. Office & P. O. address: 74 Trinity Place, New York City.

To Charles A. Curtin, Esq., Attorney for Respondent, 220 W. 40th Street, New York City; Martin G. McCue, Esq., Clerk of the Surrogates' Court of New York County.

[fol. 54] In Court of Appeals of New York

[Title omitted]

Stipulation Consolidating Appeals

It is hereby stipulated that the appeals in the above-entitled action be consolidated and that they be heard on one record and that only one undertaking on appeal be required to be served and filed.

Dated New York City, May 16th, 1927.

Cohen, Gutman & Richter, Attorneys for Executors-Appellants. Charles A. Curtin, Attorney for State Tax Commission, Respondent.

[fol. 55] In Supreme Court of New York, Appellate Division, First Department, February, 1927

Victor J. Dowling, P. J.; Edgar S. K. Merrell, Francis Martin, James O'Malley, Joseph M. Proskauer, JJ.

[Titles omitted]

[fol. 56] Appeals by the respective executors from orders of the Surrogates' Court, New York County, affirming prior orders fixing transfer taxes upon the respective decedents' estates

Edmund O. Austin, of counsel (Ehrich & Mencher, attorneys) for appellants, executors of Myer Hecht, deceased.

Abraham L. Gutman, of counsel (Wm. Victor Goldberg with him on the brief; Cohen, Gutman & Richter, attorneys) for appellants, executors of Albert Simonson, deceased.

Seth T. Cole, of counsel (Charles A. Curtin, attorney for State Tax Commission) for respondent.

Russell L. Bradford, of counsel (Charles Angulo with him on the brief); Taylor, Blanc, Capron & Marsh, Amici Curiæ.

Opinion

Proskauer, J.:

These appeals concern the constitutionality and interpretation of the amendments to Section 230 of the Tax Law made by Chapter 144 of the Laws of 1925. Prior to the enactment of that statute, under this section a contingent remainder was assessed for taxation at the highest rate on the happening of any contingencies and the tax was presently levied. By Section 241 it had been provided that the State should retain and hold to the credit of the estate so much of the tax assessed upon such contingent remainders as represented the difference between the tax [fol. 57] at the highest rate and the tax upon such remainders which would be due if the contingencies had happened at the date of the appraisal. This difference, subject to the payment of interest thereon, was thus retained by the

State, with certain alternatives as to the giving of a bond, and when the remainder finally vested in possession there was a proper adjustment with the estate. It was the settled practice under this statute to compute by mortality tables the value of the life estate and the value of the remainder. An exception to this was that in certain unusual cases, where it was impossible to compute by the mortality tables furnished by the Superintendent of Insurance the present worth of the future contingent remainder, the payment of the tax was postponed until the date of vesting and the value of the remainder was then computed on the basis of the market worth of the corpus at the time of the testator's death without any deduction for the value of the intervening life estate.

Under certain earlier forms of the statute this latter method was held to be valid in Matter of Seligmann (170 App. Div. 837; affd., 219 N. Y. 656). The change effected by the 1925 statute was to require the present assessment of the contingent remainder to be "on the full, undiminished value of such property at the time of the transfer without deduction for or on account of any intervening estate or interest." It further required the tax to be computed upon this valuation.

Section 241 was also amended correspondingly to provide that the Tax Commission should retain not merely the above stated portion of the tax, but should retain the entire tax until time of vesting, in effect, as security for the [fol. 58] ultimate payment of the tax. This deposit may be made in cash or in approved bonds or securities, and until the actual vesting of the remainders the income thereof is required "to be paid over to the executor or trustee during the continuance of the trust estates."

The decedent Myer Hecht left a residuary estate in trust amounting to $322,094.37. The widow was the beneficiary for life with contingent remainder. Her life interest as fixed on the mortality tables is worth $124,957. An inheritance tax has been levied on that amount against her life interest, and a tax in addition, based on the entire corpus of the trust estate, namely, $322,094.37, has been levied on the remainder, which the State Tax Commission insists must be paid, to be held by it subject to the provisions of

Section 241, the income on this tax to be paid to the executors during the pendency of the trust. The Surrogate has approved this procedure. The appellants claim, first, that the statute of 1925 should not be so construed, and second, that if so construed it is unconstitutional.

On the question of construction the appellant contends that the Legislature could not have intended that the words "which tax shall be computed on the full, undiminished value of such property at the time of the transfer without deduction for or on account of any intervening estate or interest" should involve present taxation of a future interest at its face value; that the words "such property" must be interpreted to mean trust property, and that the statute should be construed, therefore, to mean that the value of the entire trust should not be diminished by any intervening life estate. This construction would render the amendment meaningless. The statute is too plain for such subtlety. It means exactly what it says, that contingent re- [fol. 59] maindlers are to be assessed for the purposes of the act without deduction of the value of the life estate.

We are, therefore, to determine whether this statute violates any constitutional provision. The appellants contend that where the entire fund is $322,094.37, the life estate is valued at $124,957 and the remainder is valued at $322,094.37, there has been taxed a transfer of property amounting by $124,957 more than in fact passed under the testator's will. This argument is plausible, but unsound. It ignores completely the element of time and the simple mathematical concept of present worth. If the State became at once beneficially entitled to the tax on the contingent remainder, the mathematical conclusion reached by the appellants would be correct. But the State does not presently get this tax. The income from the cash or securities deposited to cover the tax goes back to the estate during the whole duration of the trust. There is no difference between taxing a contingent remainder on the assessment of its present worth, with a tax payable presently, and taxing it, with a tax payable at the date of vesting, on its face value rather than its present worth. One is the exact arithmetical equivalent of the other. No property right is invaded by this scheme of taxation. Viewed as an entity,

the estate is not harmed, because in effect it merely deposits security for the tax. The life tenant is not harmed, because she does not lose the income by premature payment of the tax, but is safeguarded in her enjoyment of that income by the provisions of Section 241. The remainderman loses an advantage that he had before the amendment, but is deprived of nothing to which he is entitled. Prior to the amendment he would at the date of vesting have re-[fol. 60] ceived his remainder subject to a tax based on its present worth at the date of death. Under Matter of Seligmann (170 App. Div. 837; aff'd, 219 N. Y. 656), if the tax was not payable until the date of vesting, it was proper for the authorities to assess at the face value of the remainder and not on its present worth. That is exactly what is done under the revised scheme. There is no double taxation for the State does not secure the beneficial enjoyment of the tax until the date of vesting. It is true that the Seligmann case was decided on the basis of one of the exceptions to the old procedure, where the Superintendent of Insurance's tables did not furnish sufficient basis for working out the present value of the contingent remainder, but the constitutional question underlying both cases is the same. The State invades no constitutional right by assessing a contingent remainder at its face value rather than its present worth if the State postpones its beneficial collection of the tax until the date of vesting.

The Inheritance Tax Law or the Transfer Tax Law has been one of development by gradual changes tending to secure the State in its right to collect the tax without unfairness to the beneficiaries. The difficulties of practical procedure have been recognized by the courts and each successive attempt of the Legislature to clarify the procedure has been approved. If this statute provided that the assessment should be made on face value at the time of the vesting, it could not be questioned. It should be just as free from challenge where, though the assessment is presently made, the tax is beneficially taken by the State only at the time of vesting.

The orders appealed from should be affirmed with costs.

All concur.

[fol. 61] STIPULATION WAIVING CERTIFICATION

It is hereby stipulated that the foregoing are true and correct copies of the notices of appeal to the Court of Appeals, the orders of affirmance appealed from, all the papers upon which the Courts below acted in making the said orders, and the order granting leave to appeal, and the whole thereof, and certification thereof in pursuance of Section 170 of the Civil Practice Act is hereby waived.

Dated New York, June 16, 1927.

Cohen, Gutman & Richter, Attorneys for Appellants.
Charles A. Curtin, Attorney for Respondent.

[fol. 62] IN SURROGATES' COURT OF NEW YORK COUNTY

[Title omitted]

NOTICE

SIRS: Please take notice that an order of which the annexed is a copy was duly entered and filed in the office of the Clerk of the Surrogates' Court of New York County on the 15th day of December, 1927.

Dated New York, December 16th, 1927.

Yours, &c., Charles A. Curtin, Attorney for State Tax Commission. Office & Post Office address: 220 West 40th Street, Borough of Manhattan, City of New York.

To Cohen, Gutman & Richter, Esqs., Attorneys for Executors, 74 Trinity Place, New York, N. Y.

[fol. 63] IN SURROGATES' COURT OF NEW YORK COUNTY

[Title omitted]

ORDER ON REMITTITUR—Dec. 15, 1927

Nettie I. Simonson, et al., as executors of the Last Will and Testament of Albert Simonson, deceased, having ap-

pealed to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court of the State of New York for the First Department entered on the 4th day of March, 1927, affirming an order entered in the Surrogates' Court of the County of New York on the 15th day of October, 1926, which said order affirmed the pro forma order made and entered in the Surrogates' Court of New York County on the 24th day of August, 1926, and from the order entered in the office of the Clerk of the Surrogates' Court of New York County on the 30th day of March, 1927, on the remittitur of the said Appellate Division, and the said appeal having been duly argued in the said Court of Appeals of the State of New York, and after due deliberation the said Court of Appeals of the State of New York having directed that [fols. 64 & 64½] the order so appealed from be affirmed with costs and disbursements, and having remitted the proceedings herein to this Court to be proceeded upon according to law,

Now, upon reading and filing the remittitur from the Court of Appeals of the State of New York, and upon motion of Charles A. Curtin, Attorney for the State Tax Commission, respondent, it is

Ordered that the said order of the Court of Appeals of the State of New York be and the same is made the order of this Court, and it is

Further ordered that pursuant to the aforesaid order the State Tax Commission of the State of New York recover from the estate of Albert Simonson, deceased, the sum of $104.88 costs and disbursements as taxed.

John P. O'Brien, Surrogate.

Original filed Dec. 16th, 1927. A true copy. Martin G. McCue, Clerk of Surrogates' Court. (New York Surrogate's Seal.)

[fols. 65-66½] Bond on writ of error for $500.00, approved and filed February 9, 1928, omitted in printing.

[fol. 67] In Court of Appeals of New York

[Title omitted]

Petition for Writ of Error—Filed Feb. 9, 1928

To the Hon. Benjamin N. Cardozo, Chief Judge of the Court of Appeals of the State of New York:

The petition of Nettie I. Simonson, Ettie B. Simonson and Farmers' Loan & Trust Company, as Executors of the Last Will and Testament of Albert Simonson, deceased, by Cohen, Gutman and Richter, their attorneys, respectfully shows:

(1) That on or about the 22nd day of November, 1927, the Court of Appeals of the State of New York made and entered a Final Order, Judgment and Decree herein, in favor of the State Tax Commission of New York and against your petitioners above named, and that thereafter in accordance with the law and practice of said State of New York the said Final Order, Judgment and Decree of the Court of Appeals, and the original record in this cause were remitted to the Surrogates' Court of the County of New York, wherein they now remain with directions to enter the said Final Order, Judgment and Decree and carry the same into execution, and that thereupon and on or about the 15th day of December, 1927, the said Final Order, Judgment and Decree of the Court of Appeals was entered in the said Surrogates' Court in conformity with the directions of said Court of Appeals, and was made the Final Order and Decree of said Surrogates' Court, as well as of the said Court of Appeals.

[fol. 68] (2) That in the said Final Order and Decree and the proceedings had in this cause certain errors were committed to the prejudice of your petitioners, Nettie I. Simonson, Ettie B. Simonson and Farmers' Loan and Trust Company as Executors of the Last Will and Testament of Albert Simonson, deceased, and those whom they represent, all of which will appear in more detail in the Assignment of Errors which is filed in this cause with this Petition.

(3) That said Court of Appeals of the State of New York is the highest Court of said State of New York in

which a decision in this suit and matter could be had and said Final Order and Decree entered in the said Surrogates' Court, as aforesaid, is the final Order and Decree which can be made or entered in this matter.

(4) That a printed copy of the record in the said Court of Appeals is herewith submitted, together with a certified copy of the said Final Order, Judgment and Decree of said Court of Appeals, and a certified copy of the Order of the Surrogates' Court of the County of New York, making the said Final Order, Judgment and Decree that of said Surrogates' Court as well as of said Court of Appeals. That said Court of Appeals did not render any opinion in this cause.

(5) That this suit or cause was commenced in the Surrogates' Court of the County of New York by your said petitioners as Executors as aforesaid, pursuant to the requirements of the laws of the State of New York, for the purpose of having ascertained and fixed the amount of the transfer tax payable to the State of New York by the Estate of said Albert Simonson, deceased; and that in the [fol. 69] said suit, culminating in the Final Order and Decree aforesaid there was and is duly drawn into question the validity of a statute of the State of New York, to wit: Chapter 144 of the Laws of 1925 of the State of New York, entitled "An Act to Amend the Tax Laws, in Relation to the Transfer Tax on Contingent Remainders," amending Sections 230 and 241 of the Tax Law of the State of New York, on the ground of its being repugnant to and in violation of the Fourteenth Amendment to the Constitution of the United States, and that said decision of said Court of Appeals was in favor of the validity of said statute.

Wherefore Nettie I. Simonson, Ettie B. Simonson and Farmers' Loan and Trust Company, as Executors of the Last Will and Testament of Albert Simonson, deceased, petition and pray that a Writ of Error from the Supreme Court of the United States may issue in this behalf to the Surrogates' Court of the County of New York, State of New York and the Surrogates thereof for the correction of errors and the reversal of the Final Order and Decree

so complained of, and that a copy of the record, proceedings and papers in this matter, duly authenticated, may be sent to the Supreme Court of the United States.

Dated New York, N. Y., this 7 day of February, 1928.

Nettie I. Simonson, Ettie B. Simonson, and Farmers' Loan & Trust Company, as Executors of the Last Will and Testament of Albert Simonson, Deceased, Petitioners, by Cohen, Gutman & Richter, Attorneys for Petitioners. Office and Post Office address: 74 Trinity Place, Borough of Manhattan, New York, N. Y., and Abraham L. Gutman.

[fol. 69½] [File endorsement omitted.]

[fol. 70] In Court of Appeals of New York

[Title omitted]

Assignment of Errors—Filed February 9, 1928

Now come Nettie I. Simonson, Ettie B. Simonson and Farmers' Loan and Trust Company, as executors of the Last Will and Testament of Albert Simonson, deceased, by Cohen, Gutman & Richter, their attorneys, and in connection with their petition for a writ of error show that in the record and final order, judgment and decree of the Court of Appeals of the State of New York and of the Surrogates' Court of the County of New York, upon a remittitur from said Court of Appeals in the above entitled matter wherein the petitioners and the State Tax Commission of New York are parties there is manifest error in this, to wit:

First, That the court erred in holding that Chapter 144 of the Laws of 1925 of the State of New York being an Act entitled, "An Act to Amend the Tax Law in Relation to the Transfer Tax on Contingent Remainders," approved March 16th, 1925 and Article 10 of the Tax Law and said state insofar as it is amended thereby are constitutional and are not in conflict with or in violation of the 14th amendment to the Constitution of the United States and do not deprive the petitioners, the estate of Albert Simonson and all parties having an interest therein of property

without due process of law, or of the equal protection of the laws.

Second. That the final order and decree herein is in conflict with and in violation of the provisions of the 14th [fol. 71] amendment to the Constitution of the United States.

Third. That the court erred in refusing to hold that the said Chapter 144 of the Laws of 1925 and said Tax Law insofar as it was amended thereby are repugnant to, in conflict with and in violation of the 14th amendment to the Constitution of the United States, in that thereunder there is imposed upon the transfer of the estate of said decedent a tax measured by property which was never owned or transferred by said decedent either at the time of his death or at any other time.

Fourth. That the court erred in refusing to hold that said Chapter 144 of the Laws of 1925 and the said Tax Law insofar as it is amended thereby are repugnant to, in conflict with and in violation of the 14th amendment to the Constitution of the United States in that the ax imposed thereunder operates unequally upon persons of the same class and in that the said statutes discriminate arbitrarily and unjustly in favor of one as against another member of the same class and in that under said statutes there are established classifications for the purpose of said tax which are based on supposed differences which bear no reasonable or just relation to the subject in respect to which such classifications are made.

Fifth. That the court erred in ordering and adjudging that the petitioners pay to the State Tax Commission of New York the sum of $13,996.59 as and for the transfer tax due to the State of New York pursuant to the Tax Law as amended by Chapter 144 of the Laws of 1925 in that insofar as said tax was imposed upon the transfer of the remainder interests mentioned and described in the taxing order herein, said order and judgment deprives the petitioners and those whom they represent, of property without due process of law and deprives them of the equal protection [fol. 72] of the laws, in violation of the 14th amendment to the Constitution of the United States.

Sixth. That the court erred in sustaining the order and judgment dated August 24th, 1926 approving a certain computation of the transfer tax due the State of New York from the estate of Albert Simonson, deceased, insofar as said order and judgment and said computation impose a transfer tax upon the transfer of the remainder interests under the Will of said decedent, in that said order and judgment and computation to that extent deprive your petitioners and those whom they represent of property without due process of law and of the equal protection of the laws, in violation of the 14th amendment to the Constitution of the United States.

Seventh. That the court erred in refusing to reverse the order appealed from.

Wherefore, Nettie I. Simonson, Ettie B. Simonson and the Farmers' Loan and Trust Company, as executors of the Last Will and Testament of Albert Simonson, deceased, pray that the final order and decree aforesaid may be reversed and annulled and for such other and further relief as may be just and proper.

Nettie I. Simonson, Ettie B. Simonson, and Farmers' Loan and Trust Company, as Executors of the Last Will and Testament of Albert Simonson, Deceased, Petitioners, by Cohen, Gutman & Richter, Attorneys for Petitioners, Office and P. O. Address 74 Trinity Place, Borough of Manhattan, New York City, and Abraham L. Gutman.

[fol. 72½] [File endorsement omitted.]

[fol. 73] In Court of Appeals of New York

[Title omitted]

Order Allowing Writ of Error—Filed February 9, 1928

The above entitled matter coming on to be heard upon the petition of Nettie I. Simonson, Ettie B. Simonson and Farmers' Loan & Trust Company as executors of the Last Will and Testament of Albert Simonson, deceased, for a

writ of error from the Supreme Court of the United States to the Surrogates' Court of the County of New York, State of New York and the Surrogates thereof and upon examination of said petition and the record of said matter and desiring to give the petitioners an opportunity to present to the Supreme Court of the United States the questions presented by the record in said matter;

It is ordered, that a writ of error be and is hereby allowed from the Supreme Court of the United States to the Surrogates' Court, County of New York, State of New York and the Surrogates thereof.

Dated February 7th, 1928.

Benjamin N. Cardozo, Chief Judge of the New York Court of Appeals.

[fol. 73½] [File endorsement omitted.]

[fols. 74 & 74½] Citation, in usual form, showing service on Attorney for State Tax Commission, Filed February 9, 1928, omitted in printing.

[fol. 75] In Court of Appeals of New York

Writ of Error—Filed Feb. 9, 1928

United States of America, ss:

The President of the United States of America to the Honorable the Surrogates of the Surrogates' Court of the County of New York, State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of a final order or decree which is in the said Surrogates' Court, upon a remittitur from the Court of Appeals of the State of New York, before you or one of you, being the highest court of law or equity of the said State, in which an appeal or petition could be had in the said matter of the transfer tax upon the estate of Albert Simonson, deceased, wherein was drawn in question the validity of a statute of, or an authority exercised under

said statute upon the ground of their being repugnant to the Constitution of the United States and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said Nettie I. Simonson, Ettie B. Simonson and Farmers' Loan & Trust Company as executors of the Last Will and Testament of Albert Simonson, deceased, as is stated and appears by their complaint. We, being willing that such error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the Supreme Court of the United States at Washington within thirty (30) days from the date hereof. That the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States [fol. 76] should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, this 7th day of February in the year of our Lord one thousand nine hundred and twenty eight.

Alex Gilchrist, Clerk of the United States District Court of the Southern District of New York. (Seal, District Court of the United States, Southern District of N. Y.)

The foregoing writ is hereby allowed. Benjamin N. Cardozo, Chief Judge of the New York Court of Appeals.

[fol. 76½] [File endorsement omitted.]

[fol. 77] In Surrogates' Court of New York County

[Title omitted]

Affidavit of No Opinion—Filed Feb. 21, 1928

State of New York,
County of New York, ss:

Abraham L. Gutman, being duly affirmed, deposes and

says: That he is an attorney at law and a member of the firm of Cohen, Gutman & Richter, attorneys for the plaintiffs-in-error in the above entitled matter and is familiar with the proceedings had therein; that no opinion in the above entitled matter was rendered by the Court of Appeals of the State of New York in affirming the order of the Appellate Division of the Supreme Court of the State of New York, First Department, and that no opinion was rendered by the Surrogates' Court of the County of New York in rendering its order upon the remittitur from the said Court of Appeals.

Abraham L. Gutman.

Affirmed before me this 20th day of February, 1928. Wm. V. Goldberg, Notary Public, New York County. Clerk's No. 149. Register's No. 9154. Commission expires March 30th, 1929.

[fol. 77½] [File endorsement omitted.]

[fol. 78] In Court of Appeals of New York City

[Title omitted]

Stipulation re Transcript of Record—Filed Feb. 21, 1928

It is hereby stipulated by and between the attorneys for the parties in the above entitled proceeding that the papers to be transmitted to the Supreme Court of the United States by the Clerk of the Surrogates' Court, County of New York, State of New York, pursuant to a writ of error allowed by the Hon. Benjamin N. Cardozo, Chief Judge of the New York Court of Appeals on February 7th, 1928, and issued on that day in the proceeding between the parties above mentioned, are the following, and that this stipulation shall take the place of the praecipe required to be filed by counsel for the respective parties, under and pursuant to rule 9 of the rules of the Supreme Court of the United States:

First. The remittitur of the Court of Appeals to the Surrogates' Court, New York County, dated November 23rd, 1927, including the printed record used in the Court of Appeals in the above proceeding.

Second. The order on the remittitur of the Court of Appeals entered in the office of the Clerk of the Surrogates' Court, New York County, on December 15th, 1927.

Third. The petition for writ of error, assignment of errors, bond, order allowing writ of error, and writ of error filed with the Clerk of the Surrogates' Court, New York County, on February 9th, 1928.

[fol. 79] Fourth. The citation to the respondents dated February 7th, 1928, filed with the Clerk of the Surrogates' Court, New York County, and served on February 9th, 1928.

Fifth. The affidavit of no opinion.

Sixth. The present stipulation.

It is further stipulated that the Clerk of the Surrogates' Court, New York County, may certify the transcript of record together with all of the papers used in connection with the writ of error without further formality.

Dated New York City, February 20, 1928.

Cohen, Gutman & Richter, Attorneys for Petitioners.
Charles A. Curtin, Attorney for State Tax Commission, Respondents.

[fol. 79½] [File endorsement omitted.]

[fol. 80] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation to Print Entire Record—Filed March 7, 1928

Now come Nettie I. Simonson, Ettie B. Simonson and Farmers' Loan and Trust Company as Executors of the Last Will and Testament of Albert Simonson, deceased, by Abraham L. Gutman, their attorney, and state that they

intend to rely upon the points as set forth in the assignment of errors filed herein in prosecution of their writ of error herein, and that the parts of the record to be printed herein shall be the entire transcript of the record as certified by the Clerk of the Surrogates' Court of the County of New York, State of New York.

Dated March 5, 1928.

Abraham L. Gutman.

Office and Post-Office address: No. 74 Trinity Place, New York, N. Y.

[fol. 81] Due and timely service of a copy of the within Statement and Designation on the 5th day of March, 1928, is hereby admitted.

Charles A. Curtin, Attorney for State Tax Commission, Defendants-in-Error.

[fol. 82] [File endorsement omitted.]

Endorsed on cover: File No. 33,262. New York Surrogates' Court of New York County. Term No. 80. Nettie I. Simonson, Ettie B. Simonson, and Farmers Loan & Trust Company, etc., plaintiffs in error, vs. State Tax Commission of New York. Filed February 27th, 1928. File No. 33,262.

FILED
NOV 27 1928
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

SALOMON, *et al.*,
Plaintiff-in-error,
vs.
STATE TAX COMMISSION OF NEW YORK.

OCTOBER TERM 1928
No. 79

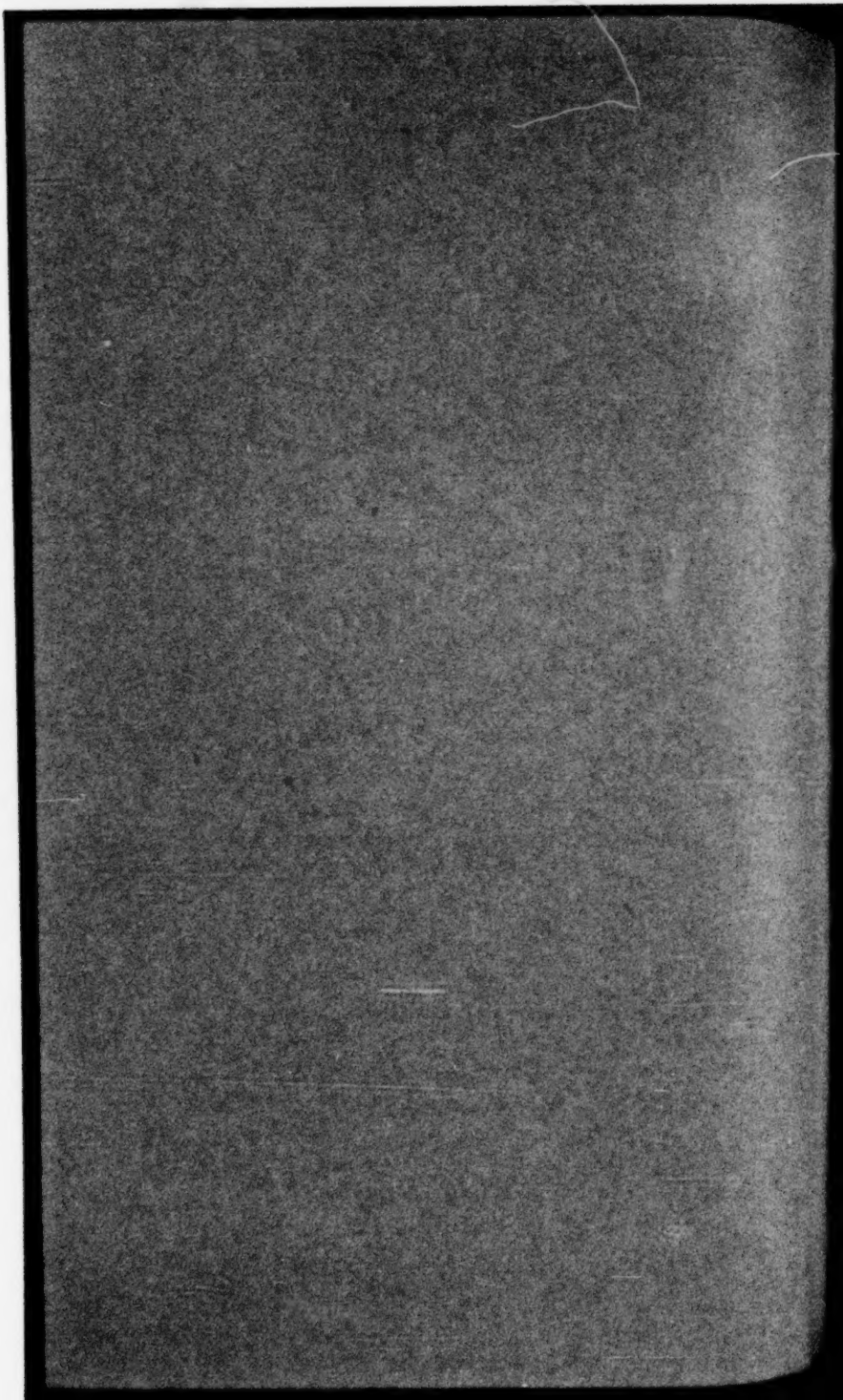
SIMONSON, *et al.*,
Plaintiff-in-error,
vs.
STATE TAX COMMISSION OF NEW YORK.

OCTOBER TERM 1928
No. 80

APPENDIX.

Containing pertinent sections of New York Transfer Tax Law in effect on dates of death of decedents herein.

PRINTED BY THE UNITED STATES BY R. H. TURNBULL, PRINTER, 205 FOURTH STREET, NEW YORK.



APPENDIX

Containing pertinent sections of New York Transfer Tax Law in effect on the dates of death of decedents herein.

ARTICLE 10

Transfer Taxes

(Schedule of Sections omitted.)

§ 220. Taxable transfers. A tax shall be and is hereby imposed upon the transfer of any property real or personal, or of any interest therein or income therefrom in trust or otherwise, to persons or corporations in the following cases, subject to the exemptions and limitations hereinafter prescribed:

1. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed thereof while a resident of the state.

2. In the case of a nonresident decedent when the transfer is by will or intestate law of any of the following items:

(a) Real property within this state, or goods, wares and merchandise within this state.

(b) Shares of stock or certificates of interest of corporations organized under the laws of this state, or of national banking associations located in this state, or of joint stock companies or associations organized under the laws of this state and including all dividends and rights to subscribe to the stock of such corporations, joint stock companies or associations or banks.

(c) Property evidenced by or consisting of shares of stock of a foreign corporation, joint stock company or association, or bonds, notes, mortgages or other evidences of interest in any corporation, joint stock company or association wherever incorporated or organized where the property represented by such shares of stock, bonds, notes, mortgages or other evidences of interest, consists of real property which is located wholly, or partly, within this state to the extent to which the value of the said items respectively is enhanced, or is represented, or is secured by real estate in the state of New York owned by such corporation, joint stock company or association. There shall be excepted from the classification of this subdivision all of such items where such corporation, joint stock company or association is or is in the nature of a moneyed corporation, a railroad or transportation corporation, a public service or manufacturing corporation as defined or classified by the laws of this state.

(d) The interest of such decedent in any partnership business conducted, wholly or partly, within the state of New York to the extent of the interest of the decedent in the partnership property within this state and the good will of such business within this state.

(e) Capital invested in business within this state.

Nothing in this section shall be taken to include deposits in banks or trust companies or with persons or corporations acting as bankers, or to permit of a transfer tax by reason of keeping securities, other than those taxable under this article, within the state.

3. All property taxable under this section not specifically bequeathed or devised, including transfers under a residuary clause in a will, shall be deemed to be transferred proportionately among all the general legatees and devisees in accordance with their several interests

in the estate, and in case of intestacy according to the proportions stated by the statute of distributions applicable thereto.

4. When the transfer is of property made by a resident, or is of property of a nonresident included within any of the classes named in subdivision two; and is made by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor, or donor or intended to take effect in possession or enjoyment at or after such death, or where any change in the use of enjoyment of property included in such transfer, or the income thereof, may occur in the lifetime of the grantor, vendor or donor by reason of any power reserved to or conferred upon the grantor, vendor or donor, either solely or in conjunction with any person or persons to alter, or to amend, or to revoke any transfer, or any portion thereof, as to the portion remaining at the time of the death of the grantor, vendor or donor, thus subject to alteration, amendment or revocation. If any one of the foregoing transfers is made for a valuable consideration, the portion of the transfer for which the grantor or vendor receives equivalent monetary value is not taxable, but the remaining portion thereof is taxable.

5. When any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer whether made before or after the passage of this chapter.

6. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property, made either before or after the passage of this chapter, such appointment when made shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to

which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will, and if the donee of the power is a nonresident all of the property and the proceeds of the property which was subject to taxation under this section at the time of the death of the donor shall be deemed to be included in the transfer.

7. Whenever property is held in the joint names of two or more persons, or as tenants by the entirety, or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property, shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased tenant by the entirety, joint tenant or joint depositor by will; been bequeathed to the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, by such deceased tenant by the entirety, joint tenant or joint depositor by will; except that in the case of tenancies by the entirety the surviving tenant shall be taxable only on one half of the value of the property so transferred.

8. The tax imposed hereby shall be upon the clear market value of such property at the rates hereinafter prescribed.

§ 221. Exceptions and Limitations. (This section exempts from taxation the property transferred to charitable, religious, and other similar corporations.) (Not material)

§ 221-a. Rates of tax. 1. Upon all transfers taxable under this article of property or any beneficial interest therein in excess of the value of five thousand dollars, to any father, mother, husband, wife, or child of the decedents, grantor, bargainor, donor or vendor, or to any child adopted as such in conformity with the laws of this state, of the decedent, grantor, bargainor, donor or vendor, or upon all transfers taxable under this article of property or any beneficial interest therein in excess of the value of five hundred dollars to any lineal descendant of the decedent, grantor, bargainor, donor or vendor, born in lawful wedlock, the tax on such transfers shall be at the rate of

One per centum on any amount up to and including the sum of twenty-five thousand dollars;

Two per centum on the next seventy-five thousand dollars or any part thereof;

Three per centum on the next one hundred thousand dollars or any part thereof;

Four per centum on the amount representing the balance of each individual transfer.

2. Upon all transfers taxable under this article of property or any beneficial interest therein in excess of the value of five hundred dollars, to a brother, sister, wife or widow of a son, or the husband of a daughter of the decedent, grantor, bargainor, donor or vendor, or to any child to whom any such decedent, grantor, bargainor, donor or vendor for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth birthday and was continuous for said ten years thereafter, the tax on such transfers shall be at the rate of

Two per centum on any amount up to and including the sum of twenty-five thousand dollars;

Three per centum on the next seventy-five thousand dollars or any part thereof;

Four per centum on the next one hundred thousand dollars or any part thereof;

Five per centum on the amount representing the balance of each individual transfer.

3. Upon all transfers taxable under this article of property or any beneficial interest therein of an amount in excess of the value of five hundred dollars, to any person or corporation other than those enumerated in paragraphs one and two of this section the tax on such transfers shall be at the rate of

Five per centum on any amount up to and including the sum of twenty-five thousand dollars;

Six per centum on the next seventy-five thousand dollars or any part thereof;

Seven per centum on the next one hundred thousand dollars or any part thereof;

Eight per centum on the amount representing the balance of each individual transfer.

§ 221 b. Repealed.

§ 221 c. Relates to non resident estates. (Not material)

§ 221 d. Relates to non resident estates. (Not material)

§ 222. Accrual and payment of tax. All taxes imposed by this article shall be due and payable at the time of the transfer, except as herein otherwise provided. Taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof can not be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when

the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof. Such tax shall be paid to the tax commission in a county in which the office of appraiser is salaried, and in other counties, to the county treasurer, and said tax commission or county treasurer shall furnish, and every executor, administrator or trustee shall take, duplicate receipts of such payment as provided in section two hundred and thirty-six.

§ 223. Discount and interest. If such tax is paid within six months from the accrual thereof, a discount of five per centum shall be allowed and deducted therefrom. If such tax is not paid within eighteen months from the accrual thereof, interest shall be charged and collected thereon at the rate of ten per centum per annum from the time the tax accrued; unless by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, such tax can not be determined and paid as herein provided, in which case interest at the rate of six per centum per annum shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which ten per centum shall be charged; provided, however, that whenever the payment of any tax imposed by this article and payable to a county treasurer has been heretofore or shall be hereafter tendered, through inadvertence, to the tax commission within the period of time before interest attaches to said tax, if such tax is paid in full to the treasurer of the proper county within ten days thereafter, the county treasurer, when directed so to do by the tax commission, may receipt in full for such tax without collecting any interest imposed thereon by this section of the tax law.

§ 224. Lien of tax and collection by executors, administrators and trustees. Every such tax shall be and

remain a lien upon the property transferred until paid and the person to whom the property is so transferred, and the executors, administrators and trustees of every estate so transferred shall be personally liable for such tax until its payment. Every executor, administrator or trustee shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such executor, administrator or trustee having in charge or in trust any legacy or property for distribution subject to such tax shall deduct the tax therefrom and shall pay over the same to the tax commission or county treasurer, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this article to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the executor, administrator or trustee, and the tax shall remain a lien or charge on such real property until paid; and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that payment of the legacy might be enforced, or by the district attorney under section two hundred and thirty-five of this chapter. If any such legacy shall be given in money to any such person for a limited period, the executor, administrator or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him, to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require.

§ 225. Refund of tax erroneously paid. (Not material)

§ 226. Taxes upon bequests and devises in lieu of commission. (Not material)

§ 227. Liability of certain corporations to tax. (Not material)

§ 228. Jurisdiction of the surrogate. The surrogate's court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under this article, or to appoint a trustee of such estate or any part thereof, shall have jurisdiction to hear and determine all questions arising under the provisions of this article, and to do any act in relation thereto authorized by law to be done by a surrogate in other matters or proceedings coming within his jurisdiction.

When it is made to appear to a surrogate of any county in this state that a safe deposit company, trust company, bank, person or corporation has in its possession or under its control papers of a decedent of whose estate such court has jurisdiction or that the decedent has leased from such a corporation a safe deposit box, and that such papers or such safe deposit box may contain a will of the decedent, or a deed to a burial plot in which the decedent is to be interred, he may make an order directing such safe deposit company, trust company, bank, person or corporation to permit a person named in the order to examine such papers or safe deposit box in the presence of a representative of the tax commission and an officer of such safe deposit company, trust company, bank or corporation, or agent of such person, and if a paper purporting to be a will of the decedent, or the deed to a burial plot is found among such papers, or in such box, to deliver such will to the clerk of the surrogate's court of

such county, or such deed to such person as may be designated in such order. The clerk of said court shall furnish a receipt upon the delivery to him of the will.

§ 229. Appointment of appraisers, stenographers, and clerks. (Not material)

§ 230. Proceedings by appraiser. (As amended by Chap. 144 Laws 1925. New matter in italics.) In each county in which the office of appraiser is not salaried the county treasurer shall act as appraiser. The surrogate, either upon his own motion, or upon the application of any interested person, including the tax commission, shall by order direct the person or one of the persons appointed pursuant to section two hundred and twenty-nine of this chapter in counties in which the office of appraiser is salaried, and in other counties, the county treasurer, to fix the fair market value of property of persons whose estates shall be subject to the payment of any tax imposed by this article.

Every such appraiser shall forthwith give notice by mail to all persons known to have a claim or interest in the property to be appraised, including the tax commission, and to such persons as the surrogate may by order direct, of the time and place when he will appraise such property. He shall at such time and place appraise the same at its fair market value as herein prescribed; and for that purpose the said appraiser is authorized to issue subpoenas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath concerning such property and the value thereof; and he shall make report thereof and of such value in writing, to the said surrogate, together with the depositions of the witnesses examined, and such other facts in relation thereto and to said matter as the surrogate may order or require. Every appraiser, except in the counties in which

the office of appraiser is salaried, for which provision is hereinbefore made, shall be paid his actual and necessary traveling expenses and the fees paid such witnesses, which fees shall be the same as those now paid to witnesses subpoenaed to attend in courts of record, payment to be made out of moneys appropriated for such purpose. No deduction shall be allowed from the appraised value of the property transferred on account of any liability of decedent incurred or assumed by the acquisition, care, improvement, use, enjoyment or disposition of property without the state, the transfer of which is not subject to tax under the provisions of this article. Any transfer of his property made by a decedent by deed, sale or gift within two years prior to his death, without a valid and adequate consideration therefor, shall be presumed to have been made in contemplation of death within the meaning of this chapter.

The value of every future or limited estate, income, interest or annuity for any life or lives in being, shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be five per centum per annum.

In estimating the value of any estate or interest in property, to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled thereto, no allowance shall be made on account of any contingent incumbrance thereon, nor on account of any contingency upon the happening of which the estate or property or some part thereof or interest therein might be abridged, defeated or diminished; provided, however, that in the event of such incumbrance taking effect as an actual burden upon the interest of the beneficiary, or in the event of the abridgment, defeat or diminution of said

estate or property or interest therein as aforesaid, a return shall be made to the person properly entitled thereto of a proportionate amount of such tax on account of the incumbrance when taking effect, or so much as will reduce the same to the amount which would have been assessed on account of the actual duration or extent of the estate or interest enjoyed. Such return of tax shall be made in the manner provided by section two hundred and twenty five of this chapter.

Where any property shall, after the passage of this chapter, be transferred subject to any charge, estate or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase accruing to any person or corporation upon the extinction or determination of such charge, estate or interest, shall be deemed a transfer of property taxable under the provisions of this article in the same manner as though the person or corporation beneficially entitled thereto had then acquired such increase from the person from whom the title to their respective estates or interest is derived.

When property is transfered in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, *which tax shall be computed on the full, undiminished value of such property at the time of the transfer without deduction for or on account of any intervening estate or interest*, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred, and the surrogate shall enter a temporary order determining the amount of said tax in accordance with this provision; pro-

vided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this article, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article, *computed upon the full, undiminished value of the property as aforesaid;* and the executor or trustee of each estate, or the legal representative having charge of the trust fund, shall immediately upon the happening of said contingencies or conditions apply to the surrogate of the proper county, upon a verified petition setting forth all the facts, and giving at least ten days' notice by mail to all interested persons or corporations, for an order modifying the temporary taxing order of said surrogate so as to provide for the final assessment and determination of the tax in accordance with the ultimate transfer or devolution of said property. *If application for modification of the temporary taxing order is not made within six months after the happening of any contingency or condition the tax as finally fixed and determined shall bear interest at the rate of six per centum per annum from the date when such contingency or condition happened to the date of the entry of the modifying order, which interest shall be in addition to the interest imposed by section two hundred and twenty three of this article for nonpayment of the tax at the highest possible rate within eighteen months from the date of the transfer.* Whenever a tax on a transfer dependent on a contingency or condition has been determined at the highest rate in the manner prescribed by the foregoing provisions, *and the personal property included in the transfer is less than the amount of said tax,* the executors or trustees, in

lieu of paying the amount so determined, may elect to file in the office of the tax commission a bond to the people of the state, approved as to form and amount by the tax commission, for the purpose of securing the payment of the tax on such transfer. The tax commission at any time may increase or decrease the amount of such bond as conditions may require.

Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited.

Where an estate for life or for years can be divested by the act or omission of the legatee or devisee it shall be taxed as if there were no possibility of such divesting.

The report of the appraiser shall be made in duplicate, one of which duplicates shall be filed in the office of the surrogate and the other in the office of the tax commission.

§ 231. Determination of surrogate. From such report of appraisal and other proof relating to any such estate before the surrogate, the surrogate shall forthwith, as of course, determine the cash value of all estates and the amount of tax to which the same are liable; or the surrogate may so determine the cash value of all such estates and the amount of tax to which the same are liable, without appointing an appraiser.

The superintendent of insurance shall, on the application of any surrogate or appraiser, determine the value of any such future or contingent estates, income and in

terest therein limited for the life or lives of persons in being, upon the facts contained in any such appraiser's report and certify the same to the surrogate or appraiser, and his certificate shall be conclusive evidence that the method of computation adopted therein is correct.

The surrogate shall immediately give notice, upon the determination by him as to the value of any estate which is taxable under this article and of the tax to which it is liable, to all persons known to be interested therein, and shall immediately forward a copy of such taxing order to the tax commission. The surrogate shall also forward to the tax commission copies of all orders entered by him in relation to or affecting in any way the transfer tax on any estate, including orders of exemption.

If, however, it appear at any stage of the proceedings that any of such persons known to be interested in the estate is an infant or an incompetent, the surrogate may, if the interest of such infant or incompetent is presently involved and is adverse to that of any of the other persons interested therein, appoint a special guardian of such infant; but nothing in this provision shall affect the right of an infant over fourteen years of age or of any one on behalf of an infant under fourteen years of age to nominate and apply for the appointment of a special guardian for such infant at any stage of the proceedings.

§ 232. Appeal and other proceedings. The tax commission or any person dissatisfied with the appraisement or assessment and determination of tax may appeal therefrom to the surrogate within sixty days from the fixing, assessing and determination of tax by the surrogate as herein provided, upon filing in the office of the surrogate a written notice of appeal, which shall state the grounds upon which the appeal is taken; but no costs shall be allowed by the surrogate on such appeal.

Within two years after the entry of an order or decree of a surrogate determining the value of an estate and assessing the tax thereon, the tax commission may, if it believes that such appraisal, assessment or determination has been fraudulently, collusively or erroneously made, make application to a justice of the supreme court of the judicial district embracing the surrogate's court in which the order or decree has been filed, for a reappraisal thereof. The justice to whom such application is made may thereupon appoint a competent person to reappraise such estate. Such appraiser shall possess the powers and be subject to the duties of an appraiser under section two hundred and thirty and shall receive compensation at the rate of five dollars per day for every day actually and necessarily employed in such appraisal. Such compensation shall be payable by the tax commission out of moneys appropriated for such purpose, upon the certificate of the justice appointing him. The report of such appraiser shall be filed with the justice by whom he was appointed, and thereafter the same proceedings shall be taken and had by and before such justice as are herein provided to be taken and had by and before the surrogate. The determination and assessment of such justice shall supersede the determination and assessment of the surrogate, and shall be filed by such justice in the office of the tax commission, and a certified copy thereof transmitted to the surrogate's court of the proper county.

§ 233. Composition of transfer tax upon certain estates. (Not material)

§ 234. Surrogates' assistants in New York, etc. (Not material)

§ 235. Proceedings by District Attorney. (Not material)

§ 236. **Receipts for taxes.** (Not material)

§ 237. **Fees of County Treasurer.** (Not material)

§ 238. **Books and forms to be furnished by the Tax Commission.** (Not material)

§ 239. **Reports of Surrogate and County Clerk.** (Not material)

§ 240. **Reports of County Treasurer.** (Not material)

§ 241. **Disposition of revenues; tax on contingent remainders; refunds in certain cases.** (As amended by Chap. 144 L. 1925. New matter in italics.) The tax commission shall deposit all taxes collected by it under this article, except as hereinafter otherwise provided, in a responsible bank, banking house or trust company in the city of Albany, which shall pay the highest rate of interest to the state for such deposit, to the credit of the state comptroller on account of the transfer tax. And every such bank, banking house or trust company shall execute and file in his office an undertaking to the state, in the sum, and with such sureties, as are required and approved by the comptroller, for the safe keeping and prompt payment on legal demand therefor of all such moneys held by or on deposit in such bank, banking house or trust company, with interest thereon on daily balances at such rate as the comptroller may fix. Every such undertaking shall have indorsed thereon, or annexed thereto, the approval of the attorney general as to its form. The tax commission shall on the first day of each month make a verified return to the state treasurer of all taxes received by it under this article, stating for what estate, and by whom and when paid; and shall credit itself with all expenditures made since its last previous return on account of

such taxes, for refunds lawfully chargeable thereto. The comptroller shall on or before the tenth day of each month pay to the state treasurer the balances of such taxes remaining in his hands at the close of business on the last day of the previous month.

Whenever the tax on a contingent remainder has been determined at the highest rate which on the happening of any of said contingencies or conditions would be possible under the provisions of this article, the tax commission, in the counties wherein this tax is payable direct to it, and in all other counties the treasurer of said counties, respectively, when such tax is paid shall retain and hold to the credit of said estate the tax assessed upon such contingent remainders, and the tax commission or the county treasurer shall deposit the amount of tax so retained in some solvent trust company or trust companies or savings banks in this state designated by the state comptroller, to the credit of the state comptroller on account of such estate, paying the interest thereon when collected by him to the executor or trustee of said estate, to be applied by said executor or trustee as provided by the decedent's will. Upon the happening of the contingencies or conditions whereby the remainder ultimately vests in possession, if the remainder then passes to persons taxable at the highest rate, the state comptroller on the certificate of the tax commission, shall turn over the amount so retained to the state treasurer as provided herein and by section two hundred and forty of this chapter, or if the remainder ultimately vests in persons taxable at a lower rate or a person or corporation exempt from taxation by the provisions of this article, the state comptroller on the certificate of the tax commission shall refund any excess of tax so held to the executor or trustee of the estate, to be disposed of by said executor or trustee as provided by the decedent's will. Executors or trustees

of any estate may elect to assign to and deposit with the tax commission or the county treasurer, bonds or other securities of the estate approved by the tax commission, both as to the form of the collateral and the amount thereof, for the purpose of securing the payment of the tax on said remainder, which said bonds or other securities shall be held by the tax commission, or the county treasurer to the credit of said estate until the actual vesting of said remainders, the income therefrom when received by the tax commission or the county treasurer to be paid over to the executor or trustee during the continuance of the trust estates.

If any executor or trustee shall have deposited with the tax commission or the county treasurer, cash or securities, or both cash and securities, to an amount in excess of the sum necessary to pay the transfer tax upon such contingent remainders, the excess of tax so deposited shall be returned to the executor or trustee, or if any executor or trustee shall have deposited with the tax commission, or the county treasurer, cash or securities, or both cash and securities, to an amount less than is sufficient to pay the tax upon such contingent remainders as finally assessed and determined, the executor or trustee of said estate shall forthwith, upon the entry of the order determining the correct amount of tax due, pay to the tax commission, or the county treasurer, whichever is entitled under the provisions of this article to receive the tax, the balance due on account of said tax. *In case securities shall have been deposited and the tax upon such contingent remainders as finally assessed and determined shall be paid, the executor or trustee shall be entitled to the return of such securities; but if the tax is not paid within sixty days after the entry of the order finally assessing and determining the tax, the tax commission may sell the securities so deposited in the open market or at*

public auction, at its option, and apply the proceeds thereof to the payment of the tax. If on account of the time or manner of payment of a tax under this article it be impossible to identify or separate the portion thereof paid on account of a contingent remainder pursuant to this section and the whole of such payment shall have been deposited in the state treasury, the portion of the tax on account of such contingent remainder to be held or deposited on account of the estate pursuant to this section shall be deemed a refund under this article, and shall be drawn, on the certificate of the tax commission and approval of the comptroller, from moneys deposited with the state comptroller and available for refunds under this article, and when so drawn shall be deposited to the credit of the state comptroller on account of the estate as provided by this section. Bonds or other securities to be deposited with the tax commission pursuant to this section shall be turned over by it to the state comptroller for safe keeping.

§ 242. Application of taxes. All taxes levied and collected under this article when paid into the treasury of the state shall be applicable to the expenses of the state government and to such other purposes as the legislature shall by law direct.

§ 243. Definitions. The words "estate" and "property," as used in this article, shall be taken to mean the property or interest therein passing or transferred to individuals or corporate legatees, devisees, heirs, next of kin, grantees, donees or vendees, and not as the property or interest therein of the decedent, grantor, donor or vendor and shall include all property or interest therein, whether situated within or without the state. The word "transfer" as used in this article shall be taken to include the passing of property or any interest therein in

the possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift, in the manner herein prescribed. The words "county treasurer" and "district attorney," as used in this article, shall be taken to mean the treasurer or the district attorney of the county of the surrogate having jurisdiction as provided in section two hundred and twenty-eight of this article. The words "the intestate laws of this state," as used in this article, shall be taken to refer to all transfers of property, or any beneficial interest therein, effected by the statute of descent and distribution and the transfer of any property, or any beneficial interest therein, effected by operation of law upon the death of a person omitting to make a valid disposition thereof, including a husband's right as tenant by the courtesy or the right of a husband to succeed to the personal property of his wife who dies intestate leaving no descendants her surviving. For any and all purposes of this article and for the just imposition of the transfer tax, every person shall be deemed to have died a resident and not a nonresident, of the state of New York, if and when such person shall have dwelt or shall have lodged in this state during and for the greater part of any period of twelve consecutive months in the twenty-four months next preceding his or her death; and also if and when by formal written instrument executed within one year prior to his or her death or by last will he or she shall have declared himself or herself to be a resident or a citizen of this state, notwithstanding that from time to time during such twenty-four months such person may have sojourned outside of this state and whether or not such person may or may not have voted or have been entitled to vote or have been assessed for taxes in this state; and also if and when such person shall have been a citizen of New York sojourning outside of this state. The burden

of proof in a transfer tax proceeding shall be upon those claiming exemption by reason of the alleged nonresidence of the deceased. The wife of any person who would be deemed a resident under this section shall also be deemed a resident and her estate subject to the payment of a transfer tax as herein provided, unless said wife has a domicile separate from him.

§ 244. Exemptions in Article I not applicable. (Not material)

§ 245. Limitation of time. (Not material)

Supreme Court of the United States

OCTOBER TERM, 1926

No. 78.

LEO SALOMON, JACQUES H. ERCKT, ISIDORE M. KASTNER, et al., etc.,

Plaintiffs in Error,

vs.

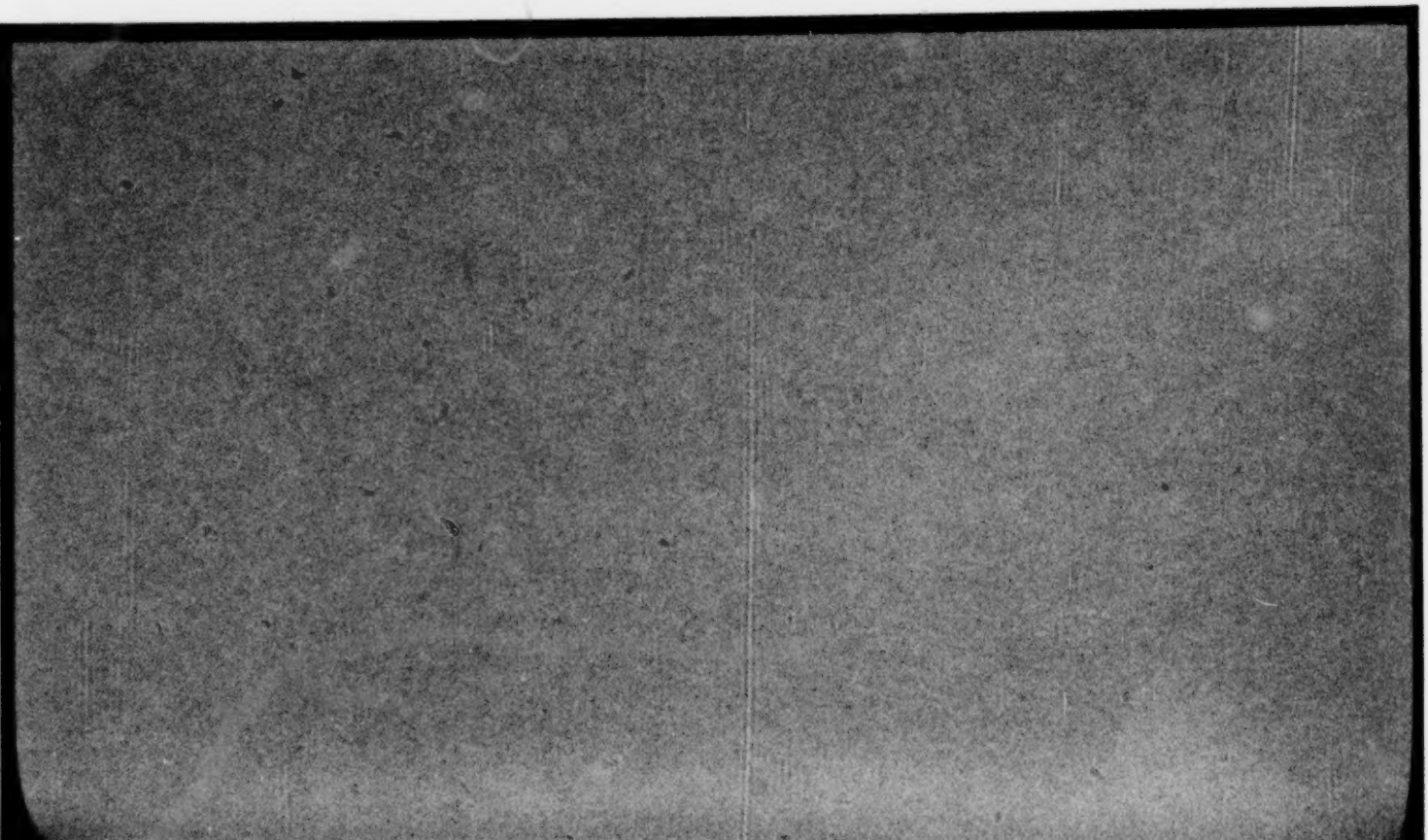
STATE TAX COMMISSION OF NEW YORK.

BRIEF OF PLAINTIFFS IN ERROR.

CHARLES ANDREAE,

Counsel for Plaintiffs in Error,

Of Counsel.



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Supreme Court of the United States

LEO SALOMON, JACQUES H. HECHT, ISIDORE M. KASTNER, *et al.*, etc., *Plaintiffs in Error,* *against* STATE TAX COMMISSION OF NEW YORK.	OCTOBER TERM 1928 No. 79

BRIEF OF PLAINTIFFS IN ERROR.

This case arises on a Writ of Error to the Surrogates' Court of the County of New York, State of New York, to review the determination of the Court of Appeals of that State, holding that Chapter 144 of the Laws of 1925 amending Sections 230 and 241 of the New York Tax Law, is not in conflict with the Fourteenth Amendment to the Constitution of the United States. The Writ was allowed and issued on February 7, 1928 (R., 55, 57). At that time Section 2 of the Act of January 31, 1928, in reference to Writs of Error (which said section was repealed on April 26, 1928), was in effect (*Robertson on Appellate Practice and Procedure in the Supreme Court of the United States, Appendix D,* page 309). The proviso contained in said Section 2 was construed by us as continuing the practice theretofore prevailing, in cases where it was sought to review the judgments of State courts of last resort. (*Robertson on Appellate Practice and Procedure*, p. 315.) If this construction should be incorrect, we respectfully ask the Court to treat the Writ of Error as an appeal, pursuant to the provisions of Section 861 of the Judicial Code. (*Robertson op. cit. supra*, p. 317.)

The opinions rendered in the courts below are reported as follows: That of the Surrogates' Court, 127 Misc. 211, and that of the Appellate Division, 219 App. Div. 656. The Court of Appeals delivered no opinion. 246 N. Y. 602.

Statement as to Jurisdiction.

The statutory provision believed to sustain the jurisdiction of this Court is subdivision (a) of Section 237 of the Judicial Code. The date of the judgment sought to be reviewed was December 15, 1927 (R., 47). The date on which the application for the Writ was made was February 7, 1928 (R., 51).

The ground on which the jurisdiction of this Court is invoked is, that there has been a final judgment in a suit in the highest court of the State in which a decision in the suit could be had, where there was drawn in question the validity of a statute of the State of New York, to-wit, Chapter 144 of the Laws of 1925, amending Sections 230 and 241 of the New York Tax Law, on the ground of its being repugnant to the Constitution of the United States, and that the decision in the State court was in favor of the statute's validity (R., 5, 36, 37, 2, 44, 48 and 51).

Cases believed to sustain the Court's jurisdiction are: *Weston* v. *Charleston*, 2 Pet. 448, 464, 465; *Mt. Vernon Cotton Co.* v. *Alabama Power Co.*, 240 U. S. 30; *Central Trans. Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 40; *St. Louis I. M. & S. Railroad Company* v. *Southern Express Co.*, 108 U. S. 24; *Winthrop Iron Company* v. *Meeker*, 109 U. S. 180; *Worall* v. *Banks*, 77 U. S. 583; *Watson* v. *State Comptroller*, 254 U. S. 122; *Wheeler* v. *Sohmer*, 233 U. S. 434.

There is one feature of the New York transfer tax practice which is rather anomalous, and which if un-

explained might lead to confusion as to the finality of the judgment here sought to be reviewed. The order assessing the tax which is made by the Surrogate in the first instance (R., 2, 3) upon the report of the Official Appraiser, is made by him *not* as a judicial officer, but as a mere tax assessor. (*Matter of Steinwender*, 172 App. Div. 871, 872; *Matter of Costello*, 189 N. Y. 288.) Accordingly, the judicial proceeding (which evidently constitutes the "suit" contemplated by subdivision (a) of Section 237 of the Judicial Code) is initiated with the so-called "appeal" under Section 232 of the New York Tax Law, which results in the judicial review by the Surrogate (acting as a judicial officer) of his prior action as a tax officer.

That judicial proceeding has been brought to a conclusion, so far as the courts of New York State are concerned, by the final order which the Surrogate entered pursuant to the mandate of the Court of Appeals, and which constituted an affirmance of his own decision rendered upon the original "appeal" to him. That particular litigation is at an end.

Therefore, it seems to us immaterial that the order assessing the tax made by the Surrogate *as a tax officer*, is characterized by the statute (Section 230) in cases such as this, where there are contingent remainders, as a "temporary" order. The reason why it is called "temporary" is that since the New York Transfer Tax Law varies in respect of rates according to the relationship of the distributees of the estate, to the deceased, it is not possible in such cases to ascertain at the time that the original assessment is made, the rate of tax that will be applicable in computing the tax on such remainders. Therefore, the statute requires that the tax on such contingent remainders be assessed and determined in the first instance by the Surrogate, acting as a tax officer, at the highest rate that would be possible under any con-

tingency. The tax as thus computed is used as the measure of the security that is exacted from the taxpayer for the purpose of guaranteeing to the State the payment of the tax on the contingent remainders, as ultimtaely computed. Later, when the remainders become vested and the applicable rate is known, there is a recomputation of the tax made by the Surrogate and a corresponding adjustment. This, of course, is a mere mathematical calculation which must likewise be deemed to be made by the Surrogate as a ministerial officer.

The object of the judicial proceeding which we initiated by our original "appeal" to the Surrogate was to invoke the protection of the United States Constitution against the action of the Surrogate as a tax officer, embodied in the said order assessing the tax, and which, when read in connection with the statute, requires us, under pain of severe penalties, to furnish to the State of New York cash or acceptable securities to guarantee the ultimate payment to the State of a tax believed by us to be unconstitutional. So far as the State courts are concerned, it has been finally determined that we are not entitled to that protection. It is that determination of the State courts which we are here seeking to review.

The fact that at some later date the same tax officer will do something *additional* under the statute, resulting not only in the seizure of our property as security for the payment of an unconstitutional tax, but also in the State's actually realizing on that security, in no way affects, we respectfully submit, the jurisdictional question involved.

Reference to the records on appeal in the cases of *Wheeler* v. *Sohmer*, 233 U. S. 434, and *Watson* v. *State Comptroller*, 254 U. S. 122, shows that similar orders were there involved (although the jurisdictional question is not discussed in the briefs), and that this Court entertained jurisdiction.

Statement of Facts.

The decedent, Meyer Hecht, died on April 2, 1925, subsequently to the date when the statute here in question took effect (R., 6, 37). He left a Will, which was duly admitted to probate by the Surrogates' Court of the County of New York (R., 6), and Letters Testamentary thereon were duly issued by said Court to the Plaintiffs in Error, the Executors and Trustees therein named (R., 6).

By such Will said decedent, after bequeathing a number of general and specific legacies, gave his residuary estate to his trustees in trust to pay the income thereof to his widow, Pauline Hecht, during her life, and upon her death to divide the principal of the trust into as many equal shares as there were children of the testator then living and children of his then deceased of whom issue were then living, and he devised and bequeathed one such share to each of his then living children, and one such share to the then living issue *per stirpes* of each of his deceased children, such issue to receive their respective portions on attaining majority except that in the case of granddaughters marrying during minority, distribution was to be made to them upon their marriage (R., 31, 32).

Pursuant to the New York statute, an official Transfer Tax Appraiser was designated by the Surrogate to appraise the decedent's estate for the purpose of computing the transfer tax due thereon (R., 6). This Appraiser fixed the value of the gross estate of the decedent at the time of his death at $452,954.54 (R., 7). Against this amount he allowed deductions totaling $47,540.17, and thus specifically found as a fact in his report to the Surrogate, that "The total of all property passing upon the death of the decedent I appraise at $405,414.37" (R., 8).

As the rates under the New York Transfer Tax Statute are graduated according to the amount transferred to each legatee or other beneficiary, and the relationship or absence thereof between the deceased and such legatee or other beneficiary, the Appraiser is required to determine the aliquot share of each such beneficiary in the decedent's estate. (R., 8). Accordingly, the said Appraiser fixed the value of the respective shares of the general and specific legatees in the decedent's estate, at the face value of their general legacies, or at the appraised value of the articles specifically bequeathed (R., 9). These general and specific legacies aggregated $83,320, thus leaving a total residuary estate of $322,094.37. (R., 10). Pursuant to the terms of the statute, (Sect. 230, 3rd par.) the aliquot share of Pauline Hecht, the testator's widow and the life beneficiary of the residuary estate, was fixed by the Appraiser, upon the basis of the tables of mortality, using a five per cent rate of interest, at $124,957 (R., 10). This sum was treated as having been transferred by the decedent outright to his widow (R., 3, 10). Thus, necessarily the balance of the estate remaining after deducting from the said total of $405,414.37 (as determined by the Appraiser) the total amount of the aliquot shares of said widow and said general and specific legatees, as fixed by said Appraiser, to-wit, $208,277, was $197,137.37. This last mentioned amount therefore necessarily represented the aliquot share in the decedent's estate of the other beneficiaries under his will, viz. the said remaindermen.

The Appraiser, however, acting under the provisions of the statute (as amended by said Chap. 144 of the Laws of 1925 and as construed by the courts below), in determining the aliquot share of the said remaindermen in the estate, substituted for the said sum of $197,137.37, the value of the entire residuary estate, to-wit, $322,-

094.37, and thus reallocated that entire fund to them, as though it had been bequeathed to them outright (R., 10). Thus, while the Appraiser found as a fact that the total amount of property which passed upon the death of the decedent was $405,414.37, he fixed the total amount of the respective shares of the beneficiaries in the said estate at $530,371.37, being $124,957 in excess of the whole estate (R., 9, 10).

Subsequently thereto an order was made by the Surrogate as a tax officer assessing a transfer tax against the said estate as though the total amount of property which passed upon the death of the decedent had been $530,371.37 instead of $405,414.37. (R., 2, 3). That is to say, the transfer tax was computed upon the transfer of an estate of $530,371.37, although it is a conceded fact, as appears from the record, that the actual value of the estate transferred was but $405,414.37 (R., 8).

The total transfer tax imposed upon the transfer of the said estate, as above computed, equals $12,905.68 (R., 2, 3). Of this amount, the statute requires that the sum of $3,271.91 (representing the tax on that portion of the estate transferred by the decedent to the general and specific legatees and to his widow, including her aliquot share thereof as life beneficiary), be paid in cash within eighteen months from the decedent's death, to the State Tax Commission, and by the latter to the State Treasurer. (Sects. 222, 241).

The balance of said tax, viz. $9,633.77, representing the tax upon the transfer of the "balance" of the estate (fictitiously inflated as above explained), must be deposited within the same period of eighteen months with the State Tax Commission, either in cash or securities acceptable to said Commission and must be retained by the latter until the death of the life tenant, as security for the payment at that time, of the said balance of tax, (subject to an adjustment as to rate, as explained in the

footnote*), the income thereon in the meanwhile being paid back to the estate. Upon the death of the life tenant the said State Tax Commission, pursuant to the provisions of said Statute, will pay the said balance of tax (subject to said adjustment) to the State Treasurer out of the said security, or out of such other cash as the estate may then furnish for that purpose, thereby releasing the said security. (Sects. 222, 230, 241).

The reason for the above explanation will presently appear, (see pg. 12), but for the sake of clarity we should point out here that the tax involved and the auxiliary provision requiring the giving of security for its payment, are concededly vital parts of a single scheme and were so treated by the courts below (R., 37, 46); so that no question of severability is presented. (*Oklahoma* v. *Wells Fargo*, 223 U. S. 298).

From the assessment of the tax made by the Surrogate as a tax officer, as above explained, an appeal was taken to the Surrogate in his judicial capacity, on the ground, among others, that the Statute and the action of the Surrogate as a tax officer thereunder, was contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States. (R., 5). The said appeal having been decided against the estate (R., 2), an appeal was taken from such decision, to the Appellate Division of the New York Supreme Court before

*NOTE. As has been already explained, the New York Transfer Tax varies as to rate according to the relationship of the beneficiary to the deceased, and the amount received by such beneficiary. Therefore, in the case of a contingent remainder the tax cannot be definitely computed until the remainders become vested. The statute thus provides that the assessment in the first instance shall be made on the basis of the maximum rate that would apply to such contingent remainder under any possible contingency. Thus, in the present case, in arriving at such maximum rate it was assumed that two of the testator's three children had predeceased the life beneficiary, thus giving the *entire* remainder to one of the children, and consequently bringing the larger portion of the estate into the higher bracket. We are not challenging that feature of the law. When the life estate terminates, and the remainder becomes vested, the applicable rate will be corrected on the basis of the actual conditions as they then exist; but the arbitrary value ascribed to the remainder interest itself by the said Appraiser, and by the said order assessing the tax, will not be disturbed.

which the constitutional objections hereinbefore mentioned, were likewise urged. (R., 45). The Appellate Division affirmed the order appealed from, whereupon an appeal was taken to the Court of Appeals on the same grounds, which appeal was likewise decided against the plaintiffs in error. (R., 60). In accordance with the New York practice, the Court of Appeals after rendering its decision, remitted all the papers in the proceeding to the Surrogates' Court, of New York County, which thereupon entered the final order of affirmance in accordance with the mandate of the Court of Appeals. (R., 47). Such final order bears date December 15, 1927. Subsequently, on February 7, 1928, a petition for Writ of Error was presented to Honorable Benjamin N. Cardozo, Chief Judge of the Court of Appeals, who on the same date allowed the same.

Assignments of Error.

There are ten assignments of error printed on pages 52 to 54 of the Record, all of which are intended to be urged, but the general language of the first of these really comprises the more specific errors assigned in the others. Said first assignment reads as follows:

> "That the court erred in holding that Chapter 144 of the Laws of 1925 of the State of New York, being an act entitled 'An Act to Amend the Tax Law in Relation to the Transfer Tax on Contingent Remainders', approved March 16, 1925, and Article 10 of the Tax Law of said State, in so far as it is amended by said Act, are constitutional, and are not in conflict with or in violation of Section (1) of the Fourteenth Amendment to the Constitution of the United States, and particularly that portion of Section (1) of said Fourteenth Amendment which reads as follows: 'Nor shall any state deprive any person of life, liberty or property without due process of law,' or that portion of Section (1) of said Fourteenth Amendment which reads as follows: 'Nor (shall any

state) deny to any person within its jurisdiction the equal protection of the laws.' "

ARGUMENT.

I.

The New York Transfer Tax Law and the Amendment to Sections 230 and 241 thereof Made by Chapter 144 of the Laws of 1925.

(Printed in Appendix submitted herewith under separate cover)

The New York transfer tax is one upon the transfer of property from the deceased, at rates graduated according to the amount transferred to each beneficiary, and the relationship or absence thereof between the deceased and beneficiary. (Sections 220 and 243 New York Tax Law.) It is similar in nature to the Federal estate tax (*Keith* v. *Johnson*, 271 U. S. 1; *Home Trust Company* v. *Law*, 236 N. Y. 607, affirming 204 App. Div. 590), which has been defined as one "upon the transfer of his net estate by decedent;" (*Edwards* v. *Slocum*, 264 U. S. 61, 62).

Matter of Hazard, 228 N. Y. 26, 31, explains the nature of the New York transfer tax as follows:

> "Taxable transfers are defined by article X of the Tax Law. It is there stated that a tax shall be imposed upon the transfer by Will or the intestate laws of any property from a person seized and possessed thereof to the persons mentioned in the Statute. *The tax is upon the clear market value of the property possessed at the time of death. It is due and payable at the time of the transfer which is also the time of death.* The amount of the tax is not affected by an increase or decrease in the value of the estate between the date of death and its subsequent distribution." (Italics ours.)

Matter of Hubbard, 234 N. Y. 175; *Matter of White*, 208 N. Y. 64, 67.

Since the rate varies with the relationship of the beneficiary to the deceased and the amount transferred to the former, it is necessary in computing the tax to determine the aliquot share of each beneficiary in the estate. If life estates and remainders are created, the respective aliquot shares in the estate, of the beneficiaries entitled thereto are fixed by reference to the mortality tables. (Sect. 230, par. 3). In practice the value of the life estate is first determined according to the designated tables of mortality, and the value of the remainder is then ascertained by deducting from the aggregate amount of the fund the value of the precedent estate (*Matter of Zborowski*, 213 N. Y. 109, 113). This is but a practical working method of arriving at substantially the same result as that obtained by valuing the life estate and remainder as separate interests according to the mortality tables (*Wolf's Inheritance Tax Calculations*, pages 39, 40).

Prior to the enactment of Chapter 144 of the Laws of 1925 the above described method of ascertaining the respective aliquot shares of the life beneficiary and remainderman in the decedent's estate was followed in all cases, that is to say, it was applied whether the remainder was vested or contingent (*Matter of Parker*, 226 N. Y. 260, 265). Chapter 144 of the Laws of 1925 (which became effective on March 16, 1925) continues that method of apportionment in cases where the remainder is absolutely and indefeasibly vested. For cases, however, where the remainder is not absolutely and indefeasibly vested (such remainders being referred to for convenience as "contingent" remainders) the said Chapter 144 of the Laws of 1925 prescribes a different treatment. Under that chapter the aliquot share of the estate transferred to the life beneficiary is first determined, as theretofore, by reference to the mortality tables, and is treated as having been transferred to such life beneficiary outright, and taxed accordingly. (R., 3). But the amount thus taxed as having been transferred

outright to the life beneficiary is not deducted from the aggregate amount of the fund which is subject to such life estate,—but the whole aggregate fund on the date of the decedent's death is taxed again as though it were not subject to a life estate at all, and as though it had been bequeathed outright to the remainderman. (R., 10).

As a consequence of the foregoing, the Statute in practical operation produces the following results:

(1) The tax upon the transfer by the decedent of his estate is measured by more property than the decedent ever transferred.

(2) The same portion of the decedent's estate is taxed *twice* as having been the subject of *two* separate transfers out of the decedent, although in the nature of things only one such transfer is possible.

(3) The aggregate value of the shares of the beneficiaries in the estate of the decedent is arbitrarily fixed at a sum in excess of the value of the whole estate.

(4) The amount upon which the tax is computed is a purely fictitious item.

(5) The burden of the tax is arbitrarily distributed among estates within the same class. This is shown graphically by the tables printed on page 28 hereof.

(6) Since, as we shall presently explain, the supposed justification for the tax is that a portion of it represents and is collected in lieu of "interest", the result is that such "interest" is computed and the payment thereof exacted without reference whatever to the actual period of time during which the State has been deprived of the tax.

It is our contention that because of the foregoing results the tax in question violates the Fourteenth Amendment to the Federal Constitution.

One feature of the statute requires further notice. As explained on page 7 of this brief, that portion of the tax which is assessed in respect of the transfer of that part of the decedent's estate which is deemed to have

been transferred by him to the life-tenant and the general and specific legatees, must be paid in cash within 18 months of the decedent's death, to the State Tax Commission and by the latter to the State Treasurer to be applied towards the expenses of the State Government as appropriated from time to time by the Legislature. (Sects. 222, 223, 241, 242). The balance of the tax, however, viz. that portion of it which is assessed in respect of the transfer of that part of the decedent's estate which is deemed to have been transferred by him to the remaindermen, must be deposited within the same period of 18 months with the State Tax Commission, either in cash or securities acceptable to it, and must be retained by the said Commission until the death of the life-tenant, as security for the payment at that time of such balance of tax (subject to an adjustment as to rate as explained in the footnote on page 8), the income meanwhile accruing thereon being paid back to the Estate. Upon the death of the life tenant, the said Tax Commission pays over the said balance of the tax (subject to said adjustment) to the State Treasurer to be applied toward the expenses of the State Government, such payment being made either out of the said security or out of such other cash as the Estate may then furnish for that purpose, thereby releasing the security.

It was because of this feature of the Statute that the courts below sustained the validity of the tax thereby imposed (R., 46, 37), in effect basing their decision upon the following mathematical formula which we quote from the opinion rendered by the Appellate Division (R., 46—the Court of Appeals rendered no opinion):

> "There is no difference between taxing a contingent remainder on the assessment of its present worth, with a tax payable presently, and taxing it, with a tax payable at the date of vesting, on its face value rather than its present worth. One is the exact arithmetical equivalent of the other."

We raise first of all the question as to whether in such an eminently practical matter as taxation (*Nicol* v. *Aimes*, 173 U. S. 509, 516) results so actual and real as those produced by the tax here involved, may be effectively disguised, and important constitutional limitations rendered nugatory by resort to a purely theoretical mathematical formula. "Taxes are very real things and statutes imposing them are estimated by practical results", said this Court in *Nichols* v. *Coolidge*, supra, 801.

That arithmetical formula moreover, far from disproving the existence of the arbitrary results enumerated on page 12 of this brief, serves rather to demonstrate that such results are brought about by the challenged statute, not only as a matter of actual fact, but as a matter of mathematical theory as well. For in order to hold true the formula requires—

> 1st—That the *rate* at which the tax on the future worth of the remainder is computed, shall be the *same* as that which would apply if such tax were calculated on the remainder's present worth.
>
> 2nd—That the period of time during which the payment of the tax is postponed, shall be the *same* as that by reference to which the respective values of the life estate and of the remainder subject thereto, are fixed.

The statute fails to adhere to the suggested formula by arbitrarily ignoring both of these essential requirements. *First*, since the tax imposed by said statute is a *graduated* one, the applicable rates on the present and future worth of the remainder will generally be different. The increase in the amount on which the tax is computed increases the rate of tax. In all such cases (and the present is one of them), the arithmetical formula referred to, will not apply. *Secondly*, the statute postpones the payment of the tax by reference to the life tenant's actual duration of life and wholly ignores in that connection the period of time representing the life tenant's expectancy. (Sections 230, 241). On the other

hand, in fixing the worth of the life estate and of the remainder subject thereto, the statute in all cases ignores completely the life tenant's actual duration of life and determines such worth by reference to the life tenant's expectancy according to the Mortality Tables. (*Matter of White*, 208 N. Y. 64; third paragraph Section 230). Since in the overwhelming majority of cases these two periods, viz. the life tenant's expectancy and his actual duration of life, do not coincide, it is clear that in all such cases the mathematical formula relied on by the Court below is not applicable. And that such is the case almost universally, and not merely occasionally or accidentally, may be readily seen by reference to the Mortality Tables themselves. For example, according to the American Experience Tables of Mortality in use in New York (Gleason & Otis on Inheritance Taxation p. 525) the expectancy of life of a person 10 years old is approximately 49 years, yet, out of 100,000 average persons of that age less than 1½% (1,468) actually die at the end of 49 years.

While we may assume that the Legislature might reasonably have chosen either the life tenant's expectancy or his actual duration of life, as the period by reference to which both the postponement of the tax was to be made and the worth of the life estate and remainder determined, we submit that such a selection under a tax scheme such as that here involved, may only be deemed rasonable if it is adhered to *for both purposes*. If so adhered to, the result (in theory, at least) would never be to tax more property than the decedent transferred; if not adhered to, the result, both in fact and in theory, will always be the taxation of more property than was transferred by the decedent.

It is precisely this latter result which we contend renders the Legislature's action unreasonable and arbitrary and hence violative of the Fourteenth Amendment.

Thus, it seems to us that the formula invoked by the Court below serves rather to condemn than to justify, the challenged statute. It formulates a theory which if ad-

hered to in the framing of the statute would have accomplished the object that the Legislature had in view, while at the same time avoiding the arbitrary and whimsical results which the statute in its present form unquestionably produces. The Legislature by failing to adhere to the said theory has robbed the tax scheme of whatever reasonable basis it otherwise might have had. Instead of explaining away the results of which we complain, the formula referred to, we submit, establishes conclusively their capricious origin.

But there was still another simple method by which the Legislature could have achieved its purpose without producing the arbitrary and bizarre results of which we are complaining. That purpose was to reimburse the State for the loss of interest on that portion of the transfer tax, the payment of which was postponed. Such purpose might have been readily attained by the simple and obvious expedient of requiring the estate to pay interest on the postponed tax.

A brief sketch of the practice which prevailed prior to the enactment of the statute here in question may prove helpful. Formerly the original order assessing the tax in cases where there were contingent remainders, fixed both the minimum and the maximum tax upon the transfer of that part of the decedent's estate represented by the contingent remainder. (R., 40 and former Sects. 230, 241). The remainder in all cases, as the life estate upon which it was dependent, was valued according to the Mortality Tables as of the date of the decedent's death. The estate was required to pay the minimum tax forthwith to the State Tax Commission, which in turn paid it over to the State Treasurer. However, the difference between the minimum and the maximum tax was required to be deposited either in cash or securities with the State Tax Commission as security for the ultimate payment of the balance of the tax found to be due, the income on the amount thus deposited being meanwhile paid back to the estate. When the life tenancy terminated there was

a recomputation of the tax upon the contingent remainder (at its value on the date of the decedent's death, as theretofore fixed), according to the rates which were found to be applicable, and thereupon the difference between the minimum tax as theretofore determined and paid, and the tax on the contingent remainder as finally fixed, was required to be paid to the State Treasurer.

The State, however, did not exact any interest on that portion of the tax the payment of which had been postponed, as above explained. Of course, if the tax found to be due as finally fixed happened to be the same as the minimum tax, no injustice was done to the State. Obviously, in most cases the amount of the tax as finally fixed would be somewhere between the minimum and the maximum tax, and accordingly the State lost interest on that portion of the tax the payment of which had been postponed, as above explained.

This situation might have been readily remedied by the simple expedient of charging interest on that portion of the tax, the payment of which was postponed. Since that portion of the tax was not payable until the death of the life tenant, the actual time during which such payment had been postponed would necessarily be then known. By computing and requiring the estate to pay interest on the postponed tax on the basis of the actual time during which the estate had had the use of the money in question, and accordingly during which the State had been deprived of that use, full justice both to the State and the taxpayer might readily have been done. Thus, it will be seen that the problem presented was one that was susceptible of an easy and simple solution. Instead of adopting such a solution, however, the novel tax scheme here involved was enacted, which, it is true, will make the State whole so far as the loss of interest is concerned, but will do this by means of the unreasonable, whimsical and arbitrary results that we have already enumerated on page 12 of this brief, which results, we contend, bring the said tax scheme into conflict with the Fourteenth Amendment to the Federal Constitution.

II.

The challenged statute is in conflict with the 14th Amendment to the U. S. Constitution for the reasons set forth under this caption.

(1) Because the tax thereby imposed upon the transfer by the decedent of his estate is measured by more property than the decedent ever transferred;

(2) Because the same portion of the decedent's estate is taxed twice as having been the subject of two separate transfers out of the decedent, although only one such transfer is possible;

(3) Because the Statute arbitrarily disregards the fact that the aggregate value of a life estate in a given fund and of the remainder subject thereto, cannot, in the nature of things, exceed the value of the whole fund.

(4) Because the tax thereby imposed is computed on a purely fictitious amount.

(5) Because the tax thereby imposed is discriminatory; and

(6) Because in effect the statute exacts the payment of interest on a tax without reference whatever to the actual time during which the payment thereof has been postponed.

(1) (a) The State may not impose a transfer tax measured by more property than was actually transferred by the deceased.

Schlesinger v. *Wisconsin*, 270 U. S. 230; *Nichols* v. *Coolidge*, 274 U. S. 531; *Frew* v. *Bowers*, 12 F. (2nd) 625;

Knowlton v. *Moore*, 178 U. S. 41, 77; *Wachovia Bank and Trust Company* v. *Doughton*, 272 U. S. 567; *Rhode Island Hospital Trust Co.* v. *Doughton*, 270 U. S. 69; *Frick* v. *Pennsylvania*, 268 U. S. 473; *Lewellyn* v. *Frick*, 268 U. S. 238.

The New York transfer tax is similar in nature to the Federal estate tax (*Keith* v. *Johnson*, 271 U. S. 1; *Home Trust Company* v. *Law*, 204 App. Div. 590, affirmed 236 N. Y. 607) which has been defined as one "upon transfer of his net estate by decedent" (*Edwards* v. *Slocum*, 264 U. S. 61, 62); although the New York tax, as already explained, is imposed at rates graduated according to the amount transferred to each beneficiary and the relationship or absence thereof between the deceased and beneficiary.

The tax itself purports to be imposed upon the clear market value of the property at the time of the transfer, which is the date of the decedent's death (*Matter of Hubbard*, 234 N. Y. 175, 179; *Matter of Hazard*, 228 N. Y. 26, 31; *Matter of Penfold*, 216 N. Y. 163; *Matter of White*, 208 N. Y. 64; Sections 243, 220 subdivision 6, of New York Tax Law).

From the very nature of such a tax it follows that it may not be imposed upon more property than was actually the subject of transfer. Since the incidence of the tax is upon the transfer of the property from the deceased, it is evident that unless such a transfer has in fact taken place, there is nothing upon which the tax can operate. The necessary basis of fact which brings both the tax and the peculiar taxing power into operation, does not exist.

Nor, we submit, may a valid distinction be drawn between imposing a transfer tax when no transfer whatever has taken place, and imposing such a tax upon a particular transfer of specific property but measuring such tax by other property which was not in fact included

in the transfer. And this for two reasons, viz.: (a) because that would be a palpable effort to impose a tax upon a transfer of property which has not in fact taken place (*Frew* v. *Bowers, supra*); and (b), because were it otherwise, the way would be open for easily doing indirectly what is forbidden to be done directly, and would render important constitutional limitations of no avail (*Frick* v. *Pennsylvania*, 268 U. S. 473, 494; *Nichols* v. *Coolidge*, 274 U. S. 531, 541).

Frew v. *Bowers, supra*, at page 628 says:

> "Further, a tax on a transfer by A, but measured by anything other than the estate of A, may be a duty or excise in form, but it is a palpable effort to tax something other than the transfer."

And again at 626:

> "We next inquire as to the nature, or at least as to the presently material attributes, of the property whose transmission gives rise to this indirect tax—this duty or excise. It is and must be the property of the decedent whose estate bears the incidence of tax. No estate, no tax, said White, C. J., in substance, in *Knowlton* v. *Moore, supra* • • • "

Similarly, in *Wardell* v. *Blum*, 276 Fed. 226, 227:

> "All inheritance taxes are imposed on the transfer of the net estate of the deceased; from which the conclusion is inevitable that the property upon which such a tax is imposed, must in truth, be the property of the deceased."

Lewellyn v. *Frick*, 268 U. S. 238, at 251:

> "There would be another (serious question) if the provisions for the liability of beneficiaries were held to be separable and it was proposed to make the estate pay a transfer tax for property that Mr. Frick did not transfer."

And finally, in *Nichols* v. *Coolidge, supra,* at page 541, it is said:

> "Certainly, Congress may lay an excise upon the transfer of property by death reckoned upon the value of the interest which passes thereby. But under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond them."

The recent cases of *Frick* v. *Pennsylvania, supra,* and *Schlesinger* v. *Wisconsin, supra,* seem to us to be directly in point. For if the State is prohibited by the Constitution from measuring such a tax by property situated beyond its jurisdiction (and which, therefore, so far as such State is concerned, has not been the subject of a taxable transfer), and if the State is likewise prohibited by the Constitution from measuring such a tax by property which has not been the subject of any testamentary transfer at all, because it was in fact transferred by the decedent prior to his death by an act which was not of a testamentary character, then *a fortiori* the State may not measure such a tax by reference to property which the decedent never owned and accordingly never transferred at any time or place whatever.

(1) (b) There can be no question that the practical operation of the challenged tax scheme is to impose a transfer tax upon more property than was transferred by the deceased.

That this is so, as a matter of actual fact, is self-evident. In fact, under the Statute as construed by the New York Courts, the fictitious multiplication of the estate may go on indefinitely, because where there are successive life estates each of them is valued at its full value according to the Mortality Tables without regard to the preceding life estates (*Matter of Hosford,* 129 Misc. 825; *Matter of Blumenthal,* N. Y. Law Journal, February 11,

1928, Vol. 78, p. 2320; *Matter of Potter*, 130 Misc. 312; *Matter of Payne*, N. Y. Law Journal, January 31, 1928, Vol. 78, p. 2094; *Matter of Sperling*, N. Y. L. Jr. May 2nd, 1928, Vol. 79, p. 545).* Thus, if we assume an estate subject to three life tenancies, each of which if valued independently would equal 50% of the estate, the computation of the transfer tax on the transfer of the estate, would be made upon a fictitious amount equivalent to 250% of the actual estate, inasmuch as under the Statute, in addition to attributing 150% to the life estates, an additional 100% is attributed to the remainder.

As we have already shown, this fictitious multiplication of the estate cannot be explained away on the basis of the mathematical formula invoked by the court below (see p. 14 hereof).

(1) (c) The suggestion that the decedent transfers in addition to his whole estate, the income which the life tenant thereafter receives, is clearly without merit.

No matter how many different estates or interests the decedent may create by his Will, that is to say, no matter into how many parts the decedent may split up his full

*The procedure in cases of successive life estates is rather complicated. The value of the first life estate is fixed on the basis of the Mortality Tables as of the date of death of the decedent. The value of the second and subsequent life estates is determined in the first instance as of the date of the appraisal (which is usually about a year after the decedent's death), but each of these estates is valued as though it were not subject in any way to any precedent estate, and as though it had actually come into existence on the date of the appraisal. When the first life estate actually terminates, the value of the second life estate is fixed according to the Mortality Tables as of the date that the first life estate terminates, but no allowance is made in respect of the prior valuation of the first life estate. This same procedure would be followed in respect of the third or any further life estates that might exist. Thus it is evident that the life estate of each of the life tenants might actually vest in enjoyment as such life tenant reached the age of 40 years. For example, suppose that the first life tenant was 39 at the date of death, but died the subsequent year; that the second life tenant was 38 on the date of death, and came into possession of his life estate when he reached 40, and thereupon lived five years, and that the third life tenant being 34 on the date of death, actually came into possession of his life estate at the age of 40. Thus assuming that these three life estates are each worth 50% of the fund, one would arrive at the result pointed out in the text.

100% ownership, it is clear that the total of these parts cannot exceed the whole estate which the decedent owned at his death. The right to receive the income of the estate for a given period is but part of the 100% ownership which was vested in the decedent. If this right to receive the income for a given period is taken from that 100% ownership, it is obvious that what remains is something less than said 100%. The right to receive income is but a mere incident or element of complete ownership. By giving this right to the life tenant for life and creating a remainder over, the deceased has merely divided into two parts his complete 100% ownership and has transferred each part to a different person.

The fact that at the termination of the life tenancy the amount of the fund remains the same as on the date of death (assuming, of course, that there has been no capital gain or loss), when viewed superficially might lead one to believe that the property transferred by the decedent to the life tenant (in this case $124,957.) has not diminished the total property passing upon the death of the deceased; but this, of course, is not so. In the nature of things the decedent cannot transfer more than what he has.

Now, what is it that the State actually does when it fixes the aliquot share of the life tenant in the decedent's estate, by reference to the mortality tables? It determines what amount of the testator's whole estate will, together with the future interest accruing on such amount, be sufficient to pay to the life tenant an annuity during the balance of his life (according to the mortality tables), equal to five per cent per annum on the entire fund. In the present case, for example, the entire fund equals $322,094.37. Five per cent per annum thereon would equal $16,104.72. The value of the widow's life estate equals $124,957. This means that the last mentioned amount, together with the interest thereon at the

rate of five per cent per annum would be sufficient to pay to the widow an annuity of $16,104.72 during the period of 11.68 years, that is, her expectancy of life according to the mortality tables. The state, therefore, determines that the widow's share in the estate of the decedent is the equivalent of an outright legacy to her of $124,957. and, therefore, imposes a tax upon the transfer to her of her life estate in exactly the same manner as though a general legacy had been bequeathed to her of $124,957.

Accordingly, the balance of the estate is necessarily $197,137.37. It is the interest* accruing on this balance during the said period of 11.68 years (the life tenant's expectancy of life) which makes good the depletion of the trust fund caused by the setting aside of the sum of $124,957. for the life tenant.

Of course, what actually happens is that the fund remains intact and the life tenant receives the entire income thereon for life. But the theory of this is that the remainderman contributes to the life tenant the interest on the former's $197,137.37 in exchange for the life tenant's leaving the principal of her $124,957. in the fund itself. Thus, if the life tenant dies before her theoretical expectancy, it simply means that the remainderman has gotten the best of this bargain. The amount which it was estimated would be required to satisfy the life estate given to the life tenant, namely $124,957., proves to be excessive and accordingly the estimated value of the remainder proves to be too low. But this obviously in no way affects the total value of the fund itself, nor does it increase in any way the amount which the decedent transferred at the time of his death.

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*Note. The decedent obviously does not transfer this interest in addition to the $197,137.37. The sum of $197,137.37 which the decedent transfers at his death necessarily includes within it, the interest which that sum is thereafter capable of earning. And since the state does not as a matter of fact postpone the collection of the tax until the end of the period representing the life tenant's theoretical expectancy, it cannot correctly be said that the state converts the said sum of $197,137.37 into what would be its theoretical equivalent, if the payment of the tax were actually postponed during such period.

(2) *Under the challenged statute the State of New York attempts to assess, levy and collect two transfer taxes upon one and the same item of property as though the same had been the subject of two distinct transfers from the deceased to two distinct beneficiaries.*

It is obvious that there can be but one transfer out of the decedent of all of the property which he owned at his death. This is true both as to the whole and each of the parts. In the nature of things each item of property constituting the decedent's estate, and each interest, right and estate of the decedent therein can be the subject of but one such transfer. Since the incidence of the tax is upon the transfer or the passing of the property from and out of the decedent, it is evident that unless such transfer or passage has actually taken place there is nothing upon which the tax can operate. On the other hand, once the transfer or passage has been completed, thus bringing the tax into operation simultaneously therewith, it is clear that as to such property the transfer or passage can never again be repeated. It has been transferred from and out of the decedent once and for all.

When the State of New York, as in the present case, sets aside out of the total estate of the decedent the sum of $124,957 as representing the portion of the decedent's estate which has been transferred by him to his widow and assesses, levies and collects a transfer tax upon such transfer, it has no power in the nature of things to subject that portion of the decedent's estate to any further tax upon the transfer thereof from the decedent, because no further transfer from the decedent of that particular portion of his estate is possible. If there was no transfer out of the decedent of the said $124,957 there could be no tax upon such transfer because it did not in fact take place. If, on the other hand, there was a transfer of said $124,957 out of the decedent and

a tax properly collected thereon, then obviously there can be no further transfer of the same property from the deceased.

We contend, therefore, that the State of New York may not treat this same portion of the testator's estate, to wit, $124,957, as having been transferred by him both to his widow and to the remainderman absolutely, and exact two transfer taxes thereon. We contend that this attempt to exact a *second* tax upon an alleged second transfer from the deceased which has never in fact taken place, is a violation of the Fourteenth Amendment to the Federal Constitution and beyond the power of the State.

(3) *The Statute arbitrarily disregards the fact that the aggregate value of a life estate in a given fund and of the remainder subject thereto, cannot in the nature of things exceed the value of the whole fund, since both are essentially but parts of that whole.*

Even a death tax statute must take the facts as it finds them. (*Schlesinger* v. *Wisconsin*, supra). Those interests in property which under our law are known as life estates and remainders are essentially but parts or portions of one entire ownership. If the testator divided his whole estate into three shares and gave one such share outright to a different legatee, no one would doubt the arbitrary and whimsical character of the Legislature's action in treating three thirds as being greater than the whole. We contend that it is no less arbitrary to treat the parts as being greater than the whole when the division is made horizontally rather than vertically.

> "Now here the estate of inheritance undergoes a division into three portions: There is first A's estate for years carved out of it; and after that B's estate for life; and then the whole that remains is limited to C and his heirs. And here

> also the first estate and both the remainders, for life and in fee, are one estate only; being nothing but parts or portions in one entire inheritance; and if there were a hundred remainders it would still be the same thing; upon a principle grounded in mathematical truth, that all of the parts are equal and no more than equal to the whole (Blackstone's Commentaries, II, 163-165)."

The courts below endeavored to escape from the mathematical absurdity upon which the Statute is based, by means of a formula which we have explained on page 13 of this brief, but which, as we have there shown, *does not hold true* as applied to the actual provisions of said Statute.

(4) The amount upon which the tax is computed is a purely fictitious item.

It will be observed that the amount by reference to which the tax is computed, remains always fictitious. It is not the amount which passes to the remainderman on the death of the decedent, because at that time the fund in question is subject to one or more life estates. Neither is it the amount which passes to the remainderman on the termination of the preceding life estates, because the Statute does not concern itself in any way with the amount of the fund at that time.

Thus, the amount upon which the tax is computed neither represents the amount transferred by the decedent at his death, to the remainderman, nor the amount transferred to such remainderman at the death of the life tenant. It always remains a fictitious amount.

(5) The tax here involved is discriminatory.

We shall assume that the Legislature has power to place vested remainders and contingent remainders in different classes for the purposes of the tax imposed under the said Statute.

Our first contention under this head is that while the Legislature by the present Statute places all estates in which there are contingent remainders, in a single class, it fails nevertheless, to accord equal treatment to the members of that class, but without method or order, bears heavily upon some and lightly upon others. And this inequality is not merely occasional or accidental but it is inherent, fundamental, purposed and pervasive in the law itself. It is, moreover, the result of the Legislature's arbitrary action in prescribing that what is essentially a partial interest in a fund shall be deemed to be the equivalent of the whole fund, and this irrespective of how small or how large a part of that whole, the partial interest may be.

The inequalities thus resulting are shown graphically by the following tables:

Amount of Total Estate	*Age of Life Tenant*	*Value of Remainder*	*Tax on Remainder*
$500,000	10 Yrs.	$ 87,375	$16 750
500,000	23 Yrs.	106,600	16,750
500,000	56 Yrs.	247,625	16,750
500,000	94 Yrs.	496,598.75	16,750

Amount of Total Estate	*Age of Life Tenant*	*Total Tax on Transfer of Total Estate*
$500,000.	10 yrs.	$30,005.00
500,000.	23 yrs.	29,236.00
500,000.	56 yrs.	23,595.00
500,000.	94 yrs.	16,784.01

For the purpose of our illustration the facts and circumstances in all four cases mentioned in the tables must be deemed to be identical, except as therein stated.

It will be observed that in all four cases the burden of the tax bears a different relation to the value of the property transferred. In the first case in first table, for example, it is approximately 20%, whereas in the last case in the same table it is less than 4%.

In the second table we have included in the total tax on the transfer of the fund the transfer tax both on the transfer of the life estate and the transfer tax on the transfer of the remainder. This is in accordance with the rule laid down by the State courts in *Matter of Vanderbilt*, 172 N. Y. 69; *Matter of Tracey*, 179 N. Y. 501; *Matter of Lynch*, N. Y. Law Journal, August 5, 1927.

The foregoing inequalities, as we have already shown, may not be explained away by the mathematical formula invoked by the courts below (p. 14 hereof).

We contend, therefore, that because of the unequal treatment accorded to the members of the same class the said Statute violates the Fourteenth Amendment to the Constitution of the United States. (*Michigan Central Railroad Co.* v. *Powers*, 201 U. S. 245, 301; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 300; *Southern Railway* v. *Greene*, 216 U. S. 400, 417; *Schlesinger* v. *Wisconsin*, 270 U. S. 230; *Royster Guano Company* v. *Virginia*, 253 U. S. 412, 415; *Giozza* v. *Tiernan*, 148 U. S. 657, 662; *Keeney* v. *New York*, 222 U. S. 525; *Watson* v. *Comptroller*, 254 U. S. 122.)

No one will contend that it was the intention of the Legislature to establish subclassifications within the major class consisting of estates in which there are contingent remainders. This is made evident from the opinions delivered by the courts below. Such being the case we contend that the question of whether or not the Legislature might have lawfully made such subclassifications does not properly arise.

Assuming, however, that the Statute here involved must be deemed to establish such subclassifications within the major class itself, and that the unequal treatment accorded to constituents of that class is sought to be justified here on the ground of the existence of such subclassifications, then we respectfully submit that such attempted subclassifications are in conflict with and in

violation of the Fourteenth Amendment to the United States Constitution because not based upon grounds of difference having a reasonable and substantial relation to the object of the legislation. (*Gulf, Colorado & Santa Fe Railway Co.* v. *Ellis*, 165 U. S. 150, 165; *Southern Railway* v. *Greene*, 216 U. S. 400, 417; *Quaker City Cab* v. *Pennsylvania*, 48 S. Ct. 553; *Watson* v. *Comptroller, supra; Keeney* v. *New York, supra; Magoun* v. *Illinois Trust & Savings Bank, supra; Schlesinger* v. *Wisconsin, supra; Royster Guano Company* v. *Virginia, supra; Nichols* v. *Coolidge, supra; Frick* v. *Pennsylvania, supra.*)

The object of the Legislature was, of course, to impose a transfer tax upon the transfer by a decedent of his net estate at the moment of his death. The statute groups into one class decedents who by their wills create contingent remainders, and subjects that act to a certain toll or impost. The act itself of creating the contingent remainder is by its nature one and the same in all of the four cases mentioned in the above tables. Yet, that act in each of the four cases is subjected to burdens of taxation that differ fundamentally and not occasionally or in point of detail. No reasonable or substantial ground of difference between these four acts can be suggested, having in mind the purposes and objects of the legislation and the nature of the tax thereby imposed.

It has been suggested that the State will collect the tax in each case at a different time. Our hypothesis is otherwise. We have assumed that in the four cases the tax is collected by the State at the same moment.

It is then urged that the basis of the subclassification is the *possibility* that the State will not collect its full tax until the termination of the life tenant's theoretical expectancy according to the Mortality Tables. But we respectfully submit that such a possibility furnishes no reasonable measure of a transfer tax such as that im-

posed by the present Statute. The tax involved is not one upon the use of property by the estate or its beneficiaries. As already pointed out, it is a tax upon the transfer of the property from the deceased which takes place at the moment of his death. To measure such a tax by reference not to the value of the estate transferred, but to the time during which the payment of a portion of the tax may be postponed, or in other words, by reference to the period of time during which the estate and its beneficiaries may enjoy the use of such postponed tax, is wholly arbitrary. The period of time during which the payment of a portion of the transfer tax may possibly be postponed is entirely unrelated to the amount of property which the decedent transferred. The tax is not one against the estate *on the use of the money representing the postponed tax.*

We claim furthermore, that it is arbitrary to refer to the said *possibility* as the measure of the transfer tax inasmuch as the actual time during which the estate has had the use of the money representing the postponed tax will necessarily be known at the date that the tax itself becomes payable, the situation presented, being essentially different from that which arises when the present value of an existing life estate is determined by reference to the Mortality Tables. This phase of the matter is more fully discussed under the head marked "(6-a)".

(6) (a) *Under the tax scheme in question an amount is exacted by way of interest which is computed without reference whatever to the actual time during which the payment of the tax has been postponed.*

As we have already explained, the purpose of the tax scheme which we are here considering was to compen-

sate the state for the loss of interest which it sustained by reason of the postponed payment of the tax on the transfer to the contingent remainderman. A brief sketch of the former practice which prevailed in New York in such cases will be found on page 16 of this brief.

What the state does in effect under the present statute is to compute the "interest" which the taxpayer is required to pay, on the basis of the mortality tables,—after the actual time during which the payment of the tax has been postponed is fully known. The theory seems to be that the tax computed upon the true value of the remainder on the date of the decedent's death, increased by the interest deemed to accrue thereon during the period of the life tenant's theoretical expectancy, will equal the amount of tax computed according to the method prescribed by the challenged statute. Of course, as the rates in both cases are different, the proposition just stated is not mathematically correct. But apart from that, it is evident that this is nothing more or less than charging interest to the taxpayer on the basis of the mortality tables, *after the actual time during which the payment of the tax has been postponed*, is fully known. We do not question the right of the state to fix the security which it will require for the payment of such interest, by reference to the tables. At the time that the security is required the facts are unknown, and to resort to the mortality tables is undoubtedly necessary and proper. But after the life tenant has died and the time for the payment of the tax has thus arrived, the state is in possession of all of the necessary facts in order to enable it to compute accurately the amount of interest due. Under such circumstances, to resort to the mortality tables *ex post facto* and after every element of futurity and uncertainty has been eliminated, is, we submit, purely arbitrary and capricious.

Thus, under the present statute, the amount of the so-called "interest" charged in each concrete case "is fixed by the mere sport of fortune". (*Frew* v. *Bowers*,

supra, page 630). It is unwarrantably large or unwarrantably small, accordingly, as the life tenant meets a premature death or outlives his theoretical expectancy. Actually what the state does is to charge one taxpayer for the use of the money which another taxpayer is enjoying without charge. This is in effect taxing one person for the benefit of another person. It is not taxation for the benefit of the state because the state gets no more than it gives. It loses the use of the money which taxpayer A is enjoying, and it requires taxpayer B to compensate the state for that loss.

(6) (b) *The suggestion that the results produced by the present statute are not more objectionable than those which ordinarily occur when a life tenant fails to survive his theoretical expectancy, is without merit.*

The difference between the use which is ordinarily made of the mortality tables and the use which is attempted to be made of them in this case is this, that in the former case no matter whether the life tenant survives or fails to survive his theoretical expectancy, the state never measures the tax by more property than was actually transferred. The failure of the life tenant to survive his theoretical expectancy merely affects the rate of tax. There is no injustice in this, because the state if it chose might tax the transfer of the fund as a whole (without apportioning it between the life tenant and the remainderman) at a flat rate. In making such apportionment between life tenant and remainderman and graduating the tax according to their respective relationships to the deceased, the state is really making a concession to the estate in the interest of a more equitable distribution of the tax. In view of the fact that at the time the tax becomes payable the apportionment cannot be made with strict accuracy (since the actual

duration of the life tenant's life cannot be foretold), it would seem clear that any reasonable method of making such apportionment would be approved of by this court, and no better method can be suggested than that of resorting to the mortality tables under such circumstances. If the actual duration of life of the life tenant proves to be less than his theoretical expectancy, the result is not unfair to the estate viewed as a taxable entity because what it has overpaid in respect of the share of the life tenant it has underpaid in respect of the remainderman's share, and one should substantially offset the other. Such use of the mortality tables does not produce the objectionable results enumerated on page 18 of this brief, which are unquestionably effected by the present statute.

III.

The postponement of collection of a portion of the tax is immaterial, if, as we contend, the State lacks constitutional power to measure a transfer tax by more property than is the subject of transfer.

If the constitutional power to impose such a tax is wanting, it obviously can make no difference whether the State attempts to exact payment of such a tax forthwith or at some later date.

The postponement of the time of payment can only bear upon the question of fact involved. As already explained, the court below by invoking a theoretical arithmetical formula based upon the period of such postponement, reached the conclusion that the tax *theoretically* was not measured by more property than was the subject of transfer. We have shown, however, that that formula is not adhered to by the present statute (pg. 14) and is therefore inapplicable.

CONCLUSION.

For the foregoing reasons the judgment of the Court below should be reversed.

Respectfully submitted,

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Counsel for Plaintiffs-in-Error.

EDMUND O. AUSTIN,
Of counsel.

[redacted]

Supreme Court of the United States

October Term, 1919

No. 98.

[redacted]

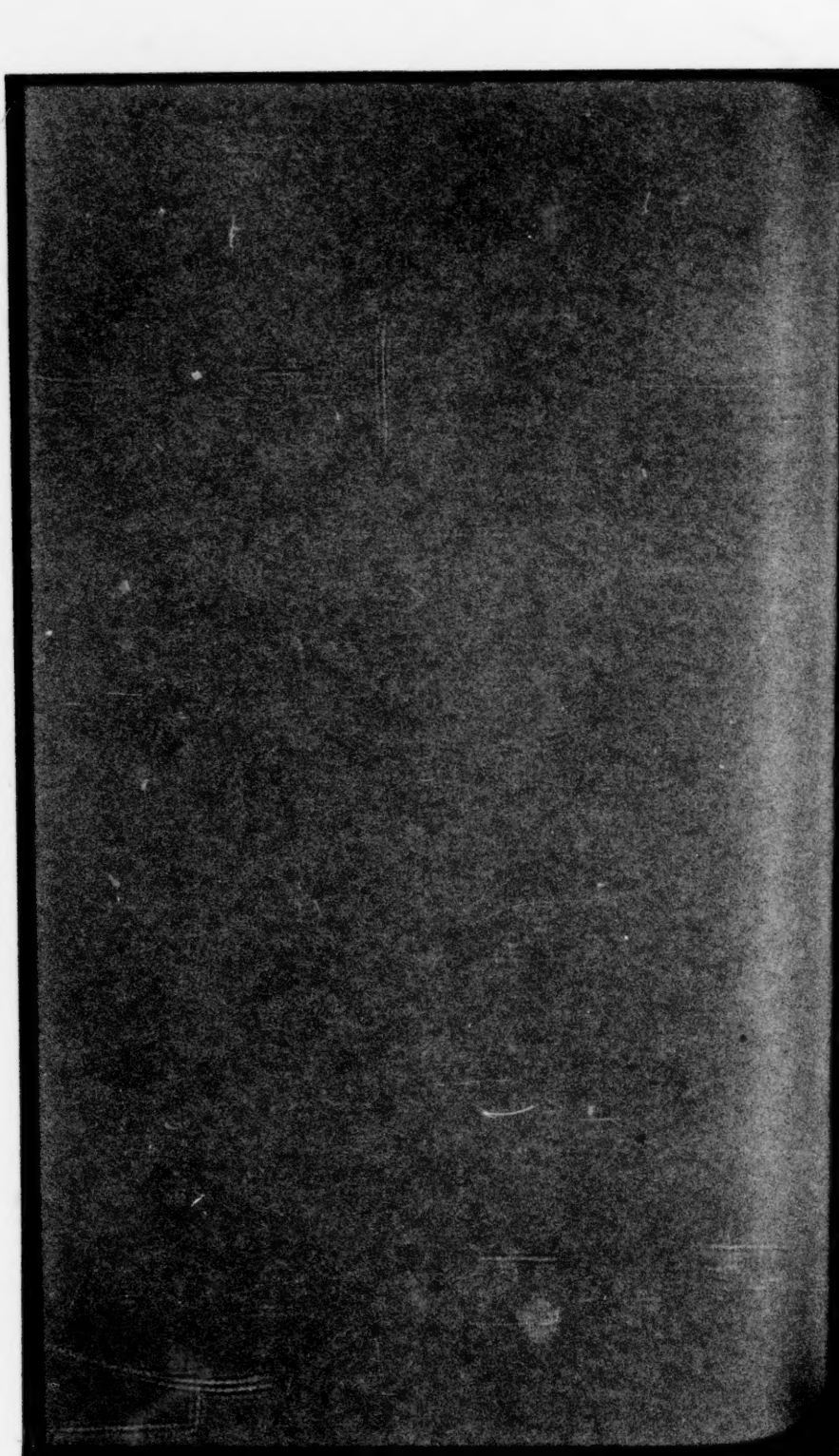
vs.

[redacted]

BRIEF FOR PLAINTIFFS-IN-ERROR.

ABRAHAM L. GUTMAN,
Counsel for Plaintiffs-in-Error.

Wm. Tyson Cummings,
of Counsel.



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Supreme Court of the United States

OCTOBER TERM, 1928.

NETTIE L. SIMONSON, ETTIE B. SIMONSON and FARMERS' LOAN AND TRUST COMPANY, etc., Plaintiffs in Error vs. STATE TAX COMMISSION OF NEW YORK, in error to the Surrogates' Court of New York County, State of New York.	No. 80.

BRIEF FOR PLAINTIFFS-IN-ERROR.

This case involves the constitutionality of Section 230 of the New York Transfer Tax Law as amended by Chapter 144 of the Laws of 1925, in so far as the same requires the valuation of contingent remainders for transfer tax purposes at a value in excess of the actual value of the interest transferred.

THE OPINIONS BELOW.

The Surrogate of New York County denied the original appeal herein without opinion on the authority of *Matter of Hecht*, 127 Misc. 211. New York Law Journal, October 9th, 1926 (R. 31). The opinion of the Appellate Division in affirming is reported at 219 App. Div. 656 (R. 36). The Court of Appeals affirmed without opinion, 246 N. Y. 601.

THE JURISDICTION OF THIS COURT.

This proceeding originated in an appeal to the Surrogate of New York County (R. 5) from the order (R. 5),

entered pursuant to Section 230 of the New York Tax Law, assessing a transfer tax on the Estate of Albert Simonson, deceased, and from the appraisal on which said order was based. The grounds of the appeal were that the taxation of the transfer of certain remainders was in violation of the Constitutions of the United States and the State of New York.

The appeal was denied by the Surrogate (R. 4), whose determination that there was no violation of the constitutional rights relied on was affirmed successively by the Appellate Division (R. 32, 36, 38-39) and the Court of Appeals (R. 2), the highest court of the state. On the remittitur or mandate of the Court of Appeals (R. 2) its judgment was made the judgment or decree of the Surrogates' Court (R. 40).

There is thus involved a judgment or decree of the highest court of the State of New York in which a decision could be had, in which was drawn in question the validity of a statute on the ground of its being repugnant to the Constitution of the United States, the decision being in favor of its validity.

The judgment or decree was final.

(a) *The judgment or decree appealed from finally determines the particular cause in litigation.* Appeals have been taken to the highest courts in the state. There are no other avenues open to plaintiffs in error along which to seek further relief. Their rights under the taxing order complained of are fixed. There is no suggestion of any further steps to be taken to conclude this special proceeding determining the tax involved in this appeal. The judgment or decree is, therefore, final.

Weston et al. v. The City Council of Charleston, 2 Pet. 449, at p. 464.

Detroit &c. Ry. v. Michigan R. R. Comm., 240 U. S. 564, at p. 571.

Holmes v. Jennison et al., 14 Pet. 540, at p. 563.

(b) *The judgment or decree is final according to the law and practice of the State of New York.* The New York Civil Practice Act, Section 588, subdivision 1, provides that an appeal may be taken to the Court of Appeals as of right from a judgment or order entered upon the decision of an Appellate Division of the Supreme Court "which finally determines an action or special proceeding wherein is directly involved the construction of the Constitution of the State or of the United States." The other two cases in which an appeal may be taken as of right are clearly not applicable to the present proceeding.

The appeal herein to the New York Court of Appeals was taken as of right (R. 34, fol. 52). It is true that by way of precaution, an appeal was also taken pursuant to leave granted by the Appellate Division (R. 34, fol. 50; R. 33). That this was entirely unnecessary, however, appears clearly from the record in the companion case of *Salomon et al. v. State Tax Commission*, which is being presented simultaneously with this case. In the *Salomon* case, an appeal only as of right was taken, and that case, involving precisely the same questions as this and wherein the same procedure was followed throughout, was presented to the New York courts together with this case and the two cases were argued as one throughout (219 App. Div. 656, *sub nom. Matter of Hecht*; 246 N. Y. 601, 602). This determination by the highest court of New York that the judgment or decree herein is a final one is binding on this court.

> *Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287, at p. 290.

See also:

> *Brinkmeier v. Missouri P. R. Co.*, 224 U. S. 268, at p. 270.
>
> *Lee v. Central of Georgia R. Co.*, 252 U. S. 109, at p. 110.
>
> *Texas & N. O. R. Co. v. Miller*, 221 U. S. 408, at p. 416.

(c) *The fact that the order is denominated a "temporary" one by the statute does not affect its finality for jurisdictional purposes.* It may be contended that there is no finality here because Section 230 of the New York Tax Law states that where there is a contingent transfer the taxing order entered by the Surrogate shall be a "temporary" one. However, what is objected to is the valuation of the remainder of the trusts for taxation purposes at the value of the corpus of the trust estates undiminished by the preceding life estates (R. 6). *That valuation is fixed for all time.* The taxing order is "temporary" only in that it may be modified at the termination of the life estates as to *rate* of tax (New York Tax Law, Sec. 230). The question of *rate* of tax is not involved; the question of *value*, which is involved, has been finally determined. Similar objections to the finality of a judgment or decree under review by this court have been uniformly disregarded.

Weston et al. v. The City Council of Charleston, *supra*, at p. 464.

Detroit &c. Ry. v. Michigan R. R. Comm., *supra*, at pp. 570-571.

Commissioners, etc. v. Lucas, Treasurer, 93 U. S. 108, at pp. 113-114.

Moreover, similar taxing orders were involved in the cases of *Wheeler v. Sohmer*, 233 U. S. 434, and *Watson v. State Comptroller*, 254 U. S. 122 (although the jurisdictional question is not discussed in the brief).

The case, therefore, is clearly one embraced within Section 237 (a) of the Judicial Code and this court has jurisdiction.

The judgment or decree to be reviewed is dated December 15th, 1927 (R. 40), and was filed December 16th, 1927 (R. 41). The writ of error was allowed by Chief Judge Cardozo of the New York Court of Appeals on February 7th, 1928 (R. 48), and filed on February 9th, 1928 (R. 47).

Statement of Facts.

Albert Simonson died on December 29th, 1925, a resident of the County and State of New York (R. 10). By paragraph Fifth of his will, the residue of his estate was left in trust, the income to be paid to his two daughters and their survivor until the death of the surviving daughter. At that time, the principal is to be paid to the grandchildren per stirpes, except that if the testator's son Felix shall not then have issue living but shall himself be alive, he is to take the share his issue would have taken had there been any (R. 27).

The executors filed a petition for the fixing of the transfer tax on their testator's estate (R. 10). The matter was referred to an appraiser (R. 9), with whom schedules of the decedent's property were filed (R. 12). The appraiser made his report (R. 6) and upon this the taxing order involved was entered (R. 5).

Statutes and Procedure Involved.

The relevant portions of Section 230 of the Tax Law, as amended by Chapter 144 of the Laws of 1925, effective March 16th, 1925, read as follows:

> "When property is transferred in trust or otherwise, and the rights, interest or estate of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, *which tax shall be computed on the full, undiminished value of such property at the time of the transfer without deduction for or on account of any intervening estate or interest*, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred, and the surrogate shall enter a temporary order determining the amount of

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said tax in accordance with this provision; provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this article, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article, *computed upon the full, undiminished value of the property as aforesaid.*" (Matter in italics added by amendment.)

Similarly, Section 241 as amended reads in part as follows:

"Whenever the tax on a contingent remainder has been determined at the highest rate which on the happening of any of said contingencies or conditions would be possible under the provisions of this article, the *tax commission* [state comptroller] in the counties wherein this tax is payable direct to it [him], and in all other counties the treasurer of said counties, respectively, when such tax is paid shall retain and hold to the credit of said estate [so much of] the tax assessed upon such contingent remainders [as represents the difference between the tax at the highest rate and the tax upon such remainders which would be due if the contingencies or conditions had happened at the date of the appraisal of said estate], and the *tax commission* [state comptroller] or the county treasurer shall deposit the amount of tax so retained in some solvent trust company or trust companies or savings banks in this state *designated by the state* comptroller, to the credit of the *state comptroller on account of* such estate, paying the interest thereon when collected by him to the executor or trustee of said estate, to be applied by said executor or trustee as provided by the decedent's will. Upon the happening of the contingencies or conditions whereby the remainder ultimately vests in possession, if the remainder then passes to persons taxable at the highest rate, the state comptroller on

> *the certificate of the tax commission* [or the county treasurer] shall turn over the amount so retained [by him] to the state treasurer as provided herein and by section two hundred and forty of this *chapter* [article], or if the remainder ultimately vests in persons taxable at a lower rate or a person or corporation exempt from taxation by the provisions of this article, the state comptroller [or the county treasurer] *on the certificate of the tax commission* shall refund any excess of tax so held [by him] to the executor or trustee of the estate, to be disposed of by said executor or trustee as provided by the decedent's will." (Matter in italics added by amendment; matter in brackets eliminated by amendment.)

The procedure under the amended statute and under which the tax in the present case was assessed is as follows:

Vested remainders are valued by deducting from the corpus of the trust estate the value of the precedent estates. *Contingent remainders, however, are valued at the full value of the corpus of the trust estate.* The tax is assessed at the highest rate upon which it might be assessed under any of the contingencies mentioned in the will, the differentiation in rates being based on the relationship of the beneficiary to the testator. Tax Law, Section 221 (a). The entire tax on the contingent remainder is retained by the state until the termination of the precedent estates, at which time an adjustment as to rate of tax is made, dependent on the relationship of the person who ultimately receives the remainder to the testator. Interest on the tax during this period is paid to the estate (see R. 37; also see *Estate of Kimball*, New York Law Journal, May 9th, 1927).

Prior to the amendment of Chapter 144 of the Laws of 1925, remainders, whether vested or contingent, were taxable at the death of the testator, the remainders being valued by deducting from the corpus of the estate the

value of the precedent estates, as is now done in the case of vested remainders only.

Matter of Zborowski, 213 N. Y. 109, at p. 113.

The tax on contingent remainders was fixed at the highest rate possible by any of the contingencies. The state held so much of the tax assessed upon a contingent remainder as represented the difference between the tax at the highest rate and the lowest possible rate, interest on this difference being paid to the estate during the running of the life estates. At the termination of the life estates, if the remainder vested in a person in some class other than the highest, a refund was made of the excess tax collected over that actually due (see R. 36, 37).

Assignments of Error.

All errors assigned are intended to be urged. All are based on the contention that the present system of transfer taxation in New York, whereby contingent remainders are valued for taxation at the full value of the corpus of the trust estate undiminished by the value of any precedent estates, is unconstitutional as violative of the Fourteenth Amendment to the Constitution of the United States in that thereby property is taken without due process of law and the constitutional guaranty of equal protection of the laws is denied.

POINT I.

The taxation of the remainder at a valuation equal to the corpus of the trust fund on which it depends, undiminished by the value of the precedent estates, is unconstitutional, being in violation of the due process of law clause of the Fourteenth Amendment.

(a) THE NEW YORK TRANSFER TAX IS ON THE TRANSFER BY THE DECEDENT AND NOT ON THE RECEIPT BY THE BENEFICIARY.

This is established beyond question by the decisions of the New York courts.

Matter of Home Trust Co. v. Law (Carnegie Estate), 204 App. Div. 590, at p. 594; aff'd without opinion, 236 N. Y. 607.
Matter of Westurn, 152 N. Y. 93, at p. 102.
Matter of Meriam, 141 N. Y. 479.

It is confirmed by a recent decision of this court.

Keith v. Johnson, 271 U. S. 1, at pp. 5, 9.

(b) BEING ON THE TRANSFER, THE TAX MUST BE MEASURED BY WHAT THE TESTATOR TRANSFERRED. THE STATE CANNOT CONSTITUTIONALLY TAX MORE.

The jurisdiction which a state must have for the purpose of validly levying a transfer tax must be based upon jurisdiction of the property transferred. This is a *sine qua non* of its existence.

Frick v. Pennsylvania, 268 U. S. 473.

See also

Buck v. Beach, 206 U. S. 392, at p. 400.
Matter of Estate of Swift, 137 N. Y. 77, at p. 86.

In other words, a state may tax the transfer of property which the decedent owned within the state's jurisdiction but may not tax the transfer of any other property.

The appraiser found that "the total of all property passing upon the death of the decedent" was $352,718.05 (R. 8). That finding has not been disputed by any party. *Yet the total taxed and stated to be distributed is $573,025.37* (R. 9, total of first column). This amount is arrived at as follows:

Cash and specific legacies	$ 12,140.00
Joint and surviving life estate of Ettie B. Simonson in residuary trust of $320,083.37, less commissions	120,401.00
Joint and surviving life estate of Nettie I. Simonson in residuary trust of $320,083.37, less commissions	120,401.00
Remainder of trust (without deducting value of foregoing life estates)	320,083.37
Total	$573,025.37

The excess of $220,307.32, owing its existence solely to a computation of the appraiser, has no basis in fact. It is non-existent property not owned by the decedent, and hence not transferred by him. The paintings in the *Frick* case had an actual existence, but one outside of the state's dominion. *A fortiori* property having *no existence whatsoever* is not within the state's jurisdiction and an attempt to tax the "transfer" of it transcends the state's powers, limited as they are by constitutional safeguards.

As the New York Court of Appeals said in *Matter of Terry*, 218 N. Y. 218, at page 223:

> "In all cases we must carve out of one total—the value of the property transferred as of the death of the decedent—the value of the present and the future interests, and the parts can never be greater than the whole."

(c) THE TAX CANNOT BE JUSTIFIED BY ATTRIBUTING TO THE REMAINDER A FICTITIOUS VALUE IN EXCESS OF ITS REAL VALUE. THE LEGISLATURE IS CONSTITUTIONALLY PROHIBITED FROM TAXING A FICTION.

To meet the argument that the state may not tax more than is transferred, it is claimed that a life estate and a remainder were transferred and that nothing more is being taxed and that the pronouncement of the legislature that the remainder has a value equal to the corpus of the trust estate precludes any further inquiry into the question of such value. The conclusion does not follow from the premise. No court will accept as binding a legislative fiat which is absolutely opposed to fact.

This prohibition against the taxing of a fiction—the taxing of the transfer of property conjured up out of thin air by legislative waving of a wand—is strikingly illustrated by the decision of this court in *Schlesinger v. Wisconsin*, 270 U. S. 230. The section of the State Transfer Act establishing an absolute presumption that gifts made within six years of death were made in contemplation of death was held unconstitutional. The presumption established a *fiction* opposed to the *fact* that many gifts made within six years of death were not made in contemplation thereof. The state was forbidden from creating by its legislative fiat transfers of property subject to a death tax when the fact might be that no such property existed.

The present case is even stronger. Undoubtedly, some gifts made within six years of death *are* made in contemplation thereof. In the case at bar, property of the value of $352,718.05 only existed, was transferred and is subject to the tax. Not one cent more of property either existed anywhere or was transferred, and fictional property worth $220,307.32 cannot be created by the legislature and, having thus been created by the legerdemain of a statute, be validly subjected to a transfer tax.

The courts below have found, as the statute required them to do, that this fictitious property does exist for tax

purposes. Such a declaration, however, whether made by court or legislation, is absolutely opposed to fact, as we have shown, and will not be allowed to stand merely because made. As was said in *Matter of Barbour*, 185 App. Div. 445, at p. 457, affirmed 226 N. Y. 639:

> "With reference to the power of the Legislature to enact a statute of the force which a Comptroller seeks to give to the amendment of 1916 to the Transfer Tax Law, while it is not open to serious dispute that it has power to enact that one fact shall be evidence of another, it is a self-evident proposition that the Legislature cannot make so that which is not so."

See also

> *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, at p. 547.
>
> *People* v. *Weller*, 237 N. Y. 316, at p. 324.
>
> *Peralta* v. *Atlantic Coast Line Co.*, 211 U. S. 210, at pp. 226-227.

That the value of the remainder is not that of the corpus of the trust estate is, of course, obvious. This court will take judicial notice of the fact that the probable—or even the certain—receipt of $1,000 ten years from now is not worth $1,000 at the present time. It is worth, of course, the present value of the corpus less that of the intervening life estates as determined by mortality tables.

Matter of Zborowski, 213 N. Y. 109, at p. 113.

This is not mere mathematical juggling of the kind resorted to by the appraiser to make two dollars' worth of property appear where only one dollar's worth existed the moment before; it is a mathematical interpretation of the actual facts. We respectfully submit that it is on mathematics having only such a factual basis that a constitutional transfer tax may be based.

(d) SECTION 230 IS NOT RENDERED CONSTITUTIONAL BY THE "SECURITY" PROVISIONS OF SECTION 241.

It was insisted by the learned justice who wrote the opinion of the Appellate Division (R. 38) that the tax although presently assessable is not payable until the remainder vests in possession, and that a tax on a contingent remainder on the assessment of its present worth payable presently and one on its face value payable at the date of vesting are "exact arithmetical equivalent(s)." Interest on the tax, paid to the life beneficiary during the course of the life estate, is said to equalize the tax on a remainder at its diminished value payable at death and one on the undiminished value payable at the time of vesting.

This equivalence does not exist for several reasons. In the first place, the assumed equivalence does not exist because the New York tax is a *graduated* one, and in nine cases out of ten and certainly in the present estate the tax on the remainder at its undiminished value will be at a different rate from the tax on the diminished value. The increase in the amount taxed increases the rate of tax. Assuming that the beneficiaries are all lineal descendants and are therefore of the so-called "one per cent. class," the tax would be one per cent. on any amount up to and including $25,000, two per cent. on the next $75,000, three per cent. on the next $100,000, and four per cent. on the balance. Similar gradations of rate are found in the two per cent. and five per cent. classes (New York Tax Law, Section 221-A).

Again, the alleged equivalence cannot exist because life tenants do not die at the precise termination of their life expectancies. Therefore, unless the exceptional does happen and the life tenant does die at the exact moment at which the mortality table predicts that he will, interest will be paid for a greater or less period than that assumed for the purposes of this "mathematical" argument. In addition, mortality and valuation tables are based on a five per cent. return. If cash is paid, the bank interest

received pursuant to Section 241 of the Tax Law will certainly not be at the same rate; if securities are deposited, it probably will not.

Finally, even if the two taxes were the same in amount, it would be no reason for sustaining the statute levying the present one. In *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, this court has said (at p. 683):

> "The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one, the unlawful tax should be held valid, does not strike us as worthy of serious consideration."

POINT II.

The amendment to Section 230 of the Tax Law is unconstitutional because it sets up arbitrary and unreasonable classifications.

No attempt is made to argue that reasonable classification is not permitted for taxation purposes. It is well settled, however, that such classifications must be based upon some real and substantial distinction bearing a real and just relation to the purpose for which the classification is made.

Southern Railway Co. v. *Greene*, 216 U. S. 400, at p. 417.

Royster Guano Co. v. *Virginia*, 253 U. S. 412, at p. 415.

Air-way Corp. v. *Day*, 266 U. S. 71, at p. 85.

Under the taxing system set up by the 1925 amendment to Section 230 of the Tax Law, this well established principle is violated in two ways:

(a) By providing different methods for evaluating vested and contingent remainders; and

(b) By discriminating between vested and contingent remaindermen.

A. VESTED AND CONTINGENT REMAINDERS MUST BE VALUED BY THE SAME METHODS.

By the amendment to Section 230 of the Tax Law, contingent remainders are given for taxation purposes the full value of the corpus of the trust estate, while vested remainders are valued by deducting from the value of the corpus the value of the precedent estates (see *supra*, p. 7). Such a distinction is so arbitrary that it cannot be supported. Both contingent and vested remainders constitute property. Either may be alienated or devised. A contingent remainder is no larger or more valuable than a vested remainder in the same amount. Both are capable of valuation by exactly the same method.

Take, for example, the case of a life estate in $1,000 for the life of Jones, with a vested remainder to Smith. Suppose another life estate in $1,000 measured by the life of the same Jones with a remainder to Brown, or, if he be dead, to Green—a contingent remainder. On Jones' death Smith will take the remainder in the first case, and either Brown or Green in the second. Yet, no matter whether Brown or Green takes, *the amount* which he receives will be exactly the same as that which goes to Smith. In other words, the value of the remainder at the time of the inception of the life estate is precisely the same in either case. No matter who takes, the value of the interest transferred is constant. This being patently so, we submit that to value the two future interests by different methods so that one is given a value greatly in excess of the other, is so arbitrary that this court will not permit it to stand.

Any statutory mandate or even course of practice whereby similar property is differently valued for tax purposes is in violation of the 14th amendment to the United States Constitution.

Sioux City Bridge v. *Dakota County*, 260 U. S. 441, at pp. 446-447.

Sunday Lake Iron Co. v. *Wakefield*, 247 U. S. 350, at pp. 352-353.

Central R. Co. of New Jersey v. *Jersey City*, 199 Fed. 237, at p. 242; aff'd 212 Fed. 76.

B. The discrimination between remaindermen is so arbitrary as to render the amendment unconstitutional.

As shown above, whether the remainderman be contingent or vested, the actual value of that which he receives is the same. Yet under New York's present taxation system, the contingent remainderman receives the corpus of the trust estate less the tax on the precedent estates and the tax on the entire corpus, while the vested remainderman receives the corpus less only the tax on the life estate and the tax on the corpus diminished in value by the value of the precedent estates.

Suppose a man leaves $10,000 in trust for the life of his wife, the remainder to his son, John—a vested remainder. Another $10,000 is left in trust for the life of his wife, the remainder to his son, Henry, if Henry be living, and if not, then to another son, James—a contingent remainder. All beneficiaries are of the 1 per cent. class so no question of a refund on the termination of the life estate arises.

Both John and either Henry or James will receive their respective shares on the same date, to wit, the death of the mother. Certainly the testator expected, as would anyone else, that when his sons receive their money each would receive the same amount, but this will not be the case if Section 230 as it now reads is upheld. Henry or James will receive a sum less than John by the amount by which the tax on the undiminished value of the corpus of his trust fund exceeds the tax on the diminished value. It is not conceivable that any legislative body has power thus to discriminate between two sons who are in the same class. One receives no more or less than the other nor is more or less property transferred by the decedent in either case.

It is no answer to state that the tax being on the transfer of property and not on its receipt, it makes no difference if contingent and vested remaindermen in the same amount receive different sums. The discrimination com-

plained of is between two classes of *property*—vested and contingent remainders—both capable of the same valuation and of being taxed in the same manner and at the same time, but which are not under the present system. In addition, however, the fact cannot be ignored that although the tax is paid by the estate and not by the beneficiary, as a matter of practical working out, the contingent remainderman is made to suffer unreasonably while the vested remainderman is favored over him.

CONCLUSION.

The judgment of the Surrogates' Court entered on the remittitur of the Court of Appeals should be reversed.

Dated, New York City, October, 1928.

Respectfully submitted,

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FILED
NOV 27 1928
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 79.

LEO SALOMON, JACQUES H. HECHT, ISIDORE M. KASTNER, *et al., etc.*,
Plaintiffs-in-Error,

versus

STATE TAX COMMISSION OF NEW YORK,
Defendants-in-Error.

BRIEF FOR DEFENDANTS-IN-ERROR.

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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BRIEF FOR DEFENDANTS IN-ERROR.

Statement of the Case.

The opinions below are reported as follows: Surrogates' Court, 127 Misc. 211; Appellate Division, First Department, 219 App. Div. 656; Court of Appeals, no opinion, 246 N. Y. 602.

The sole question presented for the determination of this court in this case is whether the transfer tax law of the state of New York is in violation of the provisions of the fourteenth amendment to the constitution of the

United States as denying "due process of law" and or "equal protection of the laws" to plaintiffs in error because of the provisions made a part thereof by chapter 144 of the laws of New York of 1925*, which require that where property is transferred subject to contingencies the tax shall be imposed upon the basis of the full, undiminished value thereof at the time of the transfer, without deduction for or on account of any intervening estate or interest, the effect of such statute in case of a transfer by will being to impose the tax at the time the transferee comes into actual possession and enjoyment of the property, instead of at the time of death, which latter is the time of the imposition of the tax on transfers which are not contingent.

The most common form of contingent transfer is a remainder created by will where the absolute vesting is dependent upon future events. The term "contingent remainder" is frequently, but inaccurately, employed to designate the contingent transfers to which the statute applies.

In order that the question at issue may receive proper consideration, it is of importance that there be presented a review showing the development of

THE POLICY OF THE STATE OF NEW YORK IN RESPECT TO THE TAXATION OF CONTINGENT TRANSFERS

The first transfer or inheritance tax law of the state of New York was enacted in 1885 (New York laws of 1885, ch. 483). Under that statute it was held that contingent

* For convenience this chapter is reproduced as Appendix A to this brief, in such form as to show the changes in the law effected by it.

transfers, not being subject to appraisal as of the date of a decedent's death, were not taxable as of that time (*Matter of Cager*, 111 N. Y. 343), but such transfers were held to be taxable when they vested in possession and enjoyment, at which time it was possible to ascertain who the beneficiaries would be and the amounts they would take. (*Matter of Stewart*, 131 N. Y. 274.) When the transfers vested, the tax was computed upon the value of the property transferred determined as of the date of the death of the transferor, but the value of any intervening life or other temporary estate was deducted. (*Matter of Sloane*, 154 N. Y. 109.) Under this procedure the state was deprived of the use of the tax on a contingent transfer during the period from the date of the transferor's death until the termination of the intervening temporary estate merely because of the fact that the transfer of the remainder was subject to contingencies. In the case of a vested transfer the state received the tax, computed in exactly the same manner and on the same valuation, at the time of the transferor's death. To illustrate: Assume that the life use of a fund of $100,000 was given to A, and upon his death the *corpus* to go to B, if living, or, if B should die before A, to C. Assume that the value of A's life estate was $25,000. If B survived A a tax would have been payable upon a valuation of $75,000, but payment would not have been required until A's death. If the same fund had been left to A for life, with remainder absolutely vested in B, B would have been taxable on $75,000, but the tax would have been payable at the time of the transferor's death. This discrimination between contingent and vested transfers was entirely indefensible.

To wipe out this discrimination the New York legislature in 1897 enacted the first provision for the taxation

of contingent transfers "at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited." (New York laws of 1897, ch. 284.) The language quoted is substantially the same as was used by the New York legislature when it enacted the provisions here under review.

The 1897 provision for taxation of contingent transfers on the basis of the full, undiminished value of the property transferred was omitted from the transfer tax law by New York laws of 1899, ch. 76, but was restored by New York laws of 1901, ch. 173, and had ever since remained in the law. It is now found in section 230 of the tax law.

The validity of imposing the tax on the basis of the full, undiminished value of the property as above set forth was passed upon and sustained by the court of appeals of New York on December 28, 1916, in *Matter of Seligmann*, 219 N.Y. 656, which affirmed 170 App. Div. 837. The provision was also before the court of appeals and was construed by it on October 22, 1907, in *Matter of Naylor*, 189 N. Y. 536, which affirmed 120 App. Div. 738, the case at appellate division appearing *sub nom. Matter of Mason*.

Under the procedure whereby the taxation of contingent transfers was suspended until the happening of the contingencies and the falling in of the estates in remainder, it became apparent that the state was suffering loss of its revenues because of the impossibility of keeping track of such transfers and of ascertaining when the

contingencies happened. The procedure also resulted in much confusion. To remedy these conditions the New York legislature in 1899 enacted a provision for the taxation of contingent transfers at the time of the transfer at the highest possible rate, the tax being made payable "out of the property transferred," but being subject to adjustment when the contingencies happened. (New York laws of 1899, ch. 76.) The constitutionality of this act was questioned but was upheld by the court of appeals in *Matter of Vanderbilt*, 172 N. Y. 69, and *Matter of Brez*, 172 N. Y. 609. In the *Brez* case it was pointed out that the change in the statute worked an injustice on the life tenant in that he was deprived of the income of that portion of the *corpus* which was applied to the payment of the tax and that the provision for refund, with interest, in cases where the remainder eventually became taxable at less than the highest rate, did not right the wrong, inasmuch as the life tenant at the time the refund became payable would be dead and could not receive the benefit thereof.

The act of 1899 provided that where the tax was paid at the highest possible rate out of the property transferred and it eventually appeared that an excess amount had been collected, such excess should be refunded with legal interest from the time it was paid. Later by New York laws of 1902, ch. 496, the rate of interest was reduced to three per cent per annum, and still later when New York laws of 1911, ch. 880, was enacted no provision whatsoever was made for interest on the amount of the refund.

To meet the objection pointed out in the *Brez* case and grant a measure of relief to the life tenant, it was provided in the act of 1911, by amendment to section 230 of the New York tax law, that a temporary order taxing a contingent

transfer might be entered, which would fix the tax at the highest possible rate and also, by amendment to section 241 of said tax law, that the state comptroller or county treasurer to whom the tax was payable should retain and hold to the credit of the estate so much of the tax so assessed as represented the difference between the tax at the highest possible rate and the tax which would be due if the contingencies or conditions had happened at the date of the appraisal of the estate, the latter amount (hereinafter referred to as the "low rate") being paid into the state treasury in the usual manner. The amount retained was required to be deposited in a trust company or savings bank to the credit of the estate and the interest earned thereon was payable to the executor or trustee of the estate to be applied as provided by the will. Upon the happening of the contingencies or conditions which determined the final disposition of the property, an adjustment of the tax was required to be made and if it then appeared that an excess amount had been collected and deposited the amount of such excess was required to be refunded, of course, without interest. Provision was also made that in lieu of paying the difference between the tax at the highest possible and low rates in cash, the executor or trustee might elect to deposit with the state comptroller (now state tax commission) or county treasurer bonds or other securities for the purpose of securing the payment of such difference, which bonds or other securities were required to be held until the happening of the contingencies or conditions and the falling in of the remainders. During the period that the bonds or other securities were so held the income therefrom was payable to the executor or trustee. This was the status of the law immediately prior to the enactment of chapter 144 of the laws of 1925.

There were two objections to the method of taxation of contingent transfers established by the act of 1911, the first being that the life tenant was still deprived of the income on the amount which was taken out of the property transferred and used to pay the tax at the low rate and to that extent at least injustice to the life tenant as pointed out in the *Brez* case was continued. The second was the same objection that was made to the law which suspended contingent transfers from taxation and did not provide for the computation of the tax on the basis of the full, undiminished value of the property when the transfers vested. That is, the value of the remainder being determined as of the date of the transferor's death by deducting from the value of the property the value of the intervening temporary estate, and only such diminished value being subjected to tax, resulted in the loss to the state of the use of so much of the tax as represented the difference between the highest and low rates from the time of the transferor's death until the contingencies or conditions happened, the income on such amount during said period being payable to the executor or trustee. In other words, if the remainders vested at the highest rate the state lost the interest on the amount which represented the difference between the highest and low rates of tax during the entire period that elapsed from the time of the transferor's death until the remainders vested, and this despite the fact that under the acts of 1897 and 1901, and ever since, when the taxation of contingent transfers is suspended the state, when the remainders fall in, receives a tax computed on the full, undiminished value of the property transferred as of the date of the transferor's death, which is substantially the equivalent of a tax on the diminished value of the property at the time of the transferor's death plus the use of the money from that time until the vesting.

The act of 1925 was designed to correct both of the aforementioned defects in the law. It gives to the life tenant the income from the entire *corpus* and it taxes the remainder on the basis of the full, undiminished value of the property transferred as of the date of the transferor's death without deduction of the value of the intervening temporary estate. The use and benefit of this tax, however, does not vest in the state until the remainder falls in and it is, therefore, substantially the equivalent of a tax payable at the time of the transferor's death, based upon the value of the *corpus*, less the value of the intervening temporary estate. The discrimination between vested and contingent transfers is removed. Adjustment of the tax is made when the remainder falls in, if it then vests in a person taxable at less than the highest rate. The provision for taxation at the full, undiminished value at the time of vesting in possession and enjoyment as applied to contingent transfers the taxation of which was suspended under the law prior to 1892, has been made applicable where the tax is immediately payable out of the property transferred. Instead of waiting for the contingencies or conditions to happen and then exacting the tax computed on the full, undiminished value, and running the risk of being then unable to collect, or perhaps of never obtaining knowledge on which to base a demand for the tax, it is required that the tax so computed shall be deposited or security given for its payment at the time of the transfer. The tax on the remainder is exactly the same as it was under the former law when taxation was suspended. Then it was computed on the full, undiminished value of the property transferred and now it is computed in identically the same way. The life tenant is treated the same as he was under the law which provided for the suspension of taxation and is better off than he was under the act of 1911 for under

that act he lost the income from a portion of the *corpus*. Under the present act he loses only that part of the income which might have been derived from the portion of the property which is used to pay the tax upon the life estate. The entire tax upon the remainder is held until it falls in and the income therefrom goes to the life tenant, or if bonds or other securities are deposited the income is paid to the life tenant, and the state receives the beneficial use of no portion of the tax until the contingencies or conditions happen. Any possible hardship which might result from the requirement that security be given for the payment of the tax when the remainder falls in is removed by the provision of the act of 1925 that where the personal property included in the transfer is less than the amount of the tax, the executors or trustees, in lieu of paying the tax or depositing bonds or other securities, may elect to file in the office of the tax commission a bond to the people of the state for the purpose of securing the payment thereof.

The intent of the legislature of New York in providing for the taxation of contingent transfers prior to the enactment of the act of 1925 was concisely stated by Judge Cardozo in *Matter of Parker*, 226 N. Y. 260, 264, when he said:

> "Everywhere the scheme disclosed is absolute safety for the state with a minimum of hardship for the life tenant."

The act of 1925 was intended to make this policy more effective. It introduced no new principle into the law of New York but was merely a somewhat different application of principles of long standing.

The act of 1925 provides:

(a) For the taxation of contingent transfers at the highest possible rate which on the happening of any contingency or condition would be possible. This principle was first enacted by the act of 1899.

(b) For the computation of the tax on the basis of the full, undiminished value of the property at the time of the transfer, without deduction for or on account of any intervening estate or interest. This principle was introduced into the law of New York by the act of 1897.

(c) For the security of the state against ultimate payment of the tax found to be due by the requirement of a deposit or the giving of security. This principle was first invoked by the act of 1911, although the act of 1899 was even more severe in that it required payment of the highest possible tax at the time of the transfer.

Thus has been developed the policy of the state of New York in respect to the taxation of contingent transfers. In each successive enactment the legislature has endeavored to procure a greater degree of equity in the imposition of the tax while at the same time protecting the revenues of the state.

At the time the bill which became chapter 144 of the laws of 1925 was pending, the same having been prepared by the state tax commission and introduced on its recommendation, a written memorandum was filed by it with the majority and minority leaders of both houses of the legislature, the speaker of the assembly, the chairmen of the committees on taxation and retrenchment of both houses and the governor, setting forth the reasons for the bill. A copy of this statement is made Appendix B to this brief.

POINT I.

There can be no question as to the power of the state of New York to classify contingent transfers and tax them in the manner provided by laws of 1925, ch. 144.

The rule is well established that this court will adopt the construction of the act of 1925 made by the court of appeals of New York. A recent case so holding is *Saltonstall v. Saltonstall*, 276 U. S. 260.

See also:

Keith v. Johnson, 274 U. S. 1;
Green v. Lessee of Neal, 6 Pet. 291;
Fairfield v. County of Gallatin, 100 U. S. 47;
Edward Hines Yellow Pine Trustees v. Martin, 268 U. S. 458.

It is not understood that plaintiffs in error challenge this rule, but we wish to point out that the court of appeals decided this case without opinion. Hence, we are without information as to the reasons which influenced that court in arriving at its conclusion. All we know is that the court of appeals examined the statute and found that it in no way conflicted with either the constitution of the state of New York or the constitution of the United States. Plaintiffs in error are therefore in error when they state, at page 13 and elsewhere in their brief, that the courts below based their decision upon the mathematical formula that there is no difference between taxing a contingent remainder on the assessment of its present worth, with a tax payable presently, and taxing it, with a tax payable at the date of vesting, on its face value rather than its

present worth, as one is the exact arithmetical equivalent of the other. This was stated by the appellate division, first department, as one of the reasons for sustaining the statute, but it does not follow that the court of appeals adopted the precise reasoning of the appellate division. We believe Mr. Justice Proskauer, who wrote the opinion at appellate division, did not intend to choose the precise language which he used. It has never been argued by defendants-in-error that there is no difference between the two methods of taxation, although it has been argued that there is no very great difference. We think Mr. Justice Proskauer was merely expressing his acquiescence in the argument of defendants-in-error which was and is that the method of taxing contingent transfers is "substantially the equivalent" of the method of taxing vested transfers. Anyway, the question of constitutionality does not turn on this point. This reference to it is merely for the purpose of keeping the record straight as to what the courts below did.

To take up the question of classification, we find it to be settled that a state may adopt any method of classification which rests upon a substantial difference and has a substantial relation to the object of the legislation. It is true that a classification which is wholly arbitrary or capricious will not be upheld, but it has been held that it is sufficient if a classification be reasonably founded in the purposes and policy of taxation.

Watson v. State Comptroller, 254 U. S. 122, where it was said (pp. 124-5):

> "Any classification is permissible which has a reasonable relation to some permitted end of governmental action. * * * It is enough, for instance, if the

classification is reasonably founded in 'the purposes and policy of taxation.'"

And in *Keeney v. New York*, 222 U. S. 525, 536, it was said:

"There can be no arbitrary and unreasonable discrimination. But when there is a difference it need not be great or conspicuous in order to warrant classification."

See also:

Beers v. Glynn, 211 U. S. 477;
Matter of Keeney, 194 N. Y. 281;
People ex rel. Farrington v. Mensching, 187 N. Y. 8;
Board of Education v. Illinois, 203 U. S. 553.

It should not require profound argument to establish that there is a very real difference between transfers which are vested and transfers which are contingent, between vested remainders and contingent remainders. In the case of the vested remainder, the person who ultimately and in all events will take it is definitely established by the will and conditions which exist at the time of the testator's death. Where the remainder is contingent it is impossible at the time of the testator's death to determine who will take it, such determination being dependent upon future events. In taxing the vested remainder the assessor may definitely point to the person against whom the tax is to be levied and, where rate depends upon relationship, the tax may be fixed with precision. Where the remainder is contingent and may pass to any one of several persons, the assessor cannot determine against whom the tax should be assessed, or the rate of taxation, if the possible re

cipients bear different relationships to the testator or the amount of tax which may be imposed varies for other reasons. The vested remainder is simple and certain; the contingent remainder is technical, complicated and uncertain. The vested transfer adapts itself readily to a system of inheritance taxation. The contingent transfer is awkward and difficult to accommodate.

That there is a clear distinction between vested and contingent remainders is brought out in *Keeney v. New York*, 222 U. S. 525, *supra*, at p. 535, where it was said:

> "It is true that in New York it is as lawful to create an estate for life, with remainder after the death of grantor, as it is to convey in fee, or with remainder after the death of a third person, or on the happening of a particular event. But there is a difference in law as well as in practical effect between these various estates. Every encouragement is given to making conveyances in fee. But, from an early date, public policy has been opposed to the private interest which impelled men to withdraw property from the channels of trade and tie it up with limitations intended, among other things, to secure to the beneficiary the use of the property, while at the same time removing it, to some extent, from liability for his debts. The favored transfers in fee need not be taxed with the latter, even though the law permits their creation. These latter estates *also differ among themselves*." (Italics ours.)

In the same case it was said (p. 535):

> "The Fourteenth Amendment does not diminish the taxing power of the State, but only requires that in its exercise the citizen must be afforded an opportunity to be heard on all questions of liability and

value, and shall not, by arbitrary and discriminatory provisions, be denied equal protection. It does not deprive the State of the power to select the subjects of taxation. But it does not follow that because it can tax any transfer (*Hatch v. Reardon*, 204 U. S. 152, 159), that it must tax all transfers, *or that all must be treated alike.*" (Italics ours.)

To show the wide range of classifications permitted under inheritance tax laws brief reference will be made to some of the methods employed. Classification is valid if made

(a) By domicile.
Board of Education v. Illinois, 203 U. S. 553, *supra.*

(b) By relationship.
Estate of Campbell, 143 Cal. 623.

(c) By amount of property transferred.
Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283.
Knoulton v. Moore, 178 U. S. 41.

(d) By the kind of property transferred.
Beers v. Glynn, 211 U. S. 477, *supra*, aff'g *Matter of Lord*, 186 N. Y. 549.
Matter of Watson, 226 N. Y. 584, aff'd *sub nom. Watson v. State Comptroller*, 254 U. S. 122, *supra.*

(e) By the kind of transfer.
Matter of Keeney, 194 N. Y. 281, aff'd *sub nom. Keeney v. New York*, 222 U. S. 525, *supra.*

On the question of classification see also:
People ex rel. Eisman v. Ronner, 185 N. Y. 285;

People ex rel. Hatch v. Reardon, 184 N. Y. 431, aff'd *sub nom. Hatch v. Reardon*, 204 U. S. 152;

Matter of McPherson, 104 N. Y. 306;

People ex rel. Farrington v. Mensching, 187 N. Y. 8, *supra*.

Contingent transfers have always been classified separately and differently from vested transfers under the various transfer tax acts of New York state. At all time vested transfers have been taxable at the time of the decedent's death, and the tax has been immediately paid into the state treasury. Under the early laws imposing the transfer tax the tax on contingent transfers was suspended. When these transfers vested, at times the diminished value at the time of the decedent's death was taxed and at other times the full undiminished value at the time of the decedent's death was taxed. From 1899 to 1911 contingent transfers were taxed at the highest possible rate and the tax was immediately paid into the state treasury, subject to a refund if it ultimately developed that the tax paid was excessive. This refund from 1899 to 1902 carried interest at six per cent, from 1902 to 1911 at three per cent and thereafter no interest was provided for. From 1911 to 1925 the tax on such contingent transfers might be fixed at both the highest possible rate and at the rate which would be due if the contingency had happened at the date of the appraisal, in which event the tax at the low rate was immediately payable into the state treasury and the difference between the highest and low rates was deposited to the credit of the estate or secured by the deposit of securities, the income from such deposits being payable to the estate until the happening of the contingency.

The act of 1925 makes a distinction in the method of taxation between contingent transfers and vested trans-

fers. Although there is no great difference in the amounts of tax imposed by the act on vested and contingent transfers, respectively, there is a considerable difference in the method of the imposition of the tax and the manner of its payment, born of the necessity which exists for treating these two classes of transfers differently.

The difference in classification being well founded in reason and the policy of the state, the test of constitutionality is the treatment accorded to the class. Does the law in its application to contingent transfers operate alike on all persons and property within the class? The answer is that there is no discrimination whatsoever, as all contingent transfers are treated exactly alike and all persons or classes of persons who take contingent transfers are treated exactly alike.

> "It may also be said that a legislature is not bound to impose the same rate of tax upon one class of property that it does upon another. As it may exempt all of one class so it may impose a different rate of taxation. It is sufficient if all of the same class are subjected to the same rate and the tax is administered impartially upon them."
>
> *Michigan Central Railroad v. Powers*, 201 U. S. 245, 302.

In *Billings v. Illinois*, 188 U. S. 97, the inheritance tax law of Illinois imposed no tax upon life estates passing to a mother, father, husband, wife, brother and sister, the widow of a son or a lineal descendant of the decedent, provided the remainder after the life estate was transferred to collateral heirs, strangers in the blood or bodies politic or corporate, but did impose a tax upon such life estates when the remainder passed to lineal heirs. It was held

that the Illinois act did not violate the fourteenth amendment to the constitution of the United States for the reason that the legislature of Illinois had the right to classify the transfers and treat the classes differently in imposing its taxes. Surely, if a classification scheme is valid which puts in one class life estates where the remainder passes to collateral heirs, etc., and in another class, life estates where the remainder passes to direct heirs, there would seem to be no doubt but that the New York legislature may put vested remainders in one class and contingent remainders in another and tax them differently, particularly when there is not only a very marked difference in the nature of the remainders but a very good reason for separate classification for the purpose of carrying into effect the taxing policy and system of the state.

In the *Billings* case, in discussing classification, it was said (pp. 101-3):

> "We said it was established by cases that classification must be based on some reasonable ground. It could not be a 'mere arbitrary selection.' But what is the test of an arbitrary selection? It is difficult to exhibit it precisely in a general rule. 'Classification is essentially the same in law as it is in other departments of knowledge or practice. It is the grouping of things in speculation or practice, because they 'agree with one another in certain particulars and differ from other things in those same particulars.' Things may have very diverse qualities, and yet be united in a class. They may have very similar qualities, and yet be cast in different classes. Cattle and horses may be considered in a class for some purposes. Their differences are certainly pronounced. Salt and sugar may be associated in a grocer's stock for a

grocer's purposes. To confound them in use would be very disappointing. Human beings are essentially alike, yet some individuals may have attributes or relations not possessed by others, which may constitute them a class. But their classification—indeed, all classification—must primarily depend upon purpose—the problem presented. Science will have one purpose, business another and legislation still another. The latter, of course, on account of the restraints upon the legislature, may not be legal—may not be within the power of the legislature. To dispute that power, however, is not the same thing at to dispute a classification, and yet that there may be dependence—more freedom of classification in some instances—has been indicated by the cases. A state cannot regulate interstate commerce, however accurate its classification of objects may be. On the other hand, the taxing power of a state is one of its most extensive powers. It cannot be exercised upon persons grouped according to their complexions. It can be exercised if they are grouped according to their occupations. A state may regulate or suppress combinations to restrict the sale of products. The power cannot be exerted to forbid combinations among those who buy products and permit combinations among those who raise or grow products. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540. And yet, exercising its taxing power, it has been decided, that a state may make that discrimination. *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89. Other illustrations may be taken from the cases which tend to the same end. If the purpose is within the legal powers of the legislature, and the classification made has relation to that purpose (excludes no persons or objects that are affected by the purpose, includes all

that are), logically speaking, it will be appropriate; legally speaking, a law based upon it will have equality of operation. And, excluding our right to consider policies or assume legislation, we have many times said that a state in its purposes and in the execution of them, must be allowed a wide range of discretion, and that this court will not make itself 'a harbor in which can be found a refuge from ill advised, unequal and oppressive legislation.' *Mobile Co. v. Kimball*, 102 U. S. 691."

At page 104, it was said:

"Undoubtedly, life tenants regarded simply as persons, may be in legal contemplation the same; estates for life regarded simply as estates with their attributes also in legal contemplation, may be said to be the same, but that is not all that is to be considered, nor is it determinative. We must regard the power of the State over testate and intestate dispositions of property, its power to create and limit estates, and, as resulting, its power to impose conditions upon their transfer or devolution. It is upon this power that inheritance tax laws are based, and we said, in the *Magoun* case, that the power could be exercised by distinguishing between the lineal and collateral relatives of a testator. There the amount of tax depended upon him who immediately received; here the existence of the tax depends upon him who ultimately receives. That can make no difference with the power of the State. No discrimination being exercised in the creation of the class, equality is observed. Crossing the lines of the classes created by the statute discriminations may be exhibited, but within the classes there is equality."

POINT II.

The method of measurement of the tax is reasonable and one which the state of New York may properly adopt as a regulation of the right of succession.

The tax upon contingent transfers under the act of 1925 is measured by the full, undiminished value of the property transferred as of the date of the transfer, although the effect of the law is to defer the payment until the contingencies happen and the remaindermen come into possession and enjoyment.

Is there anything inherently wrong with this method of measuring the tax which would constitute a violation of the fourteenth amendment of the constitution of the United States?

The New York transfer tax is a tax on the succession to property at the death of the owner and not upon the property itself. It is a regulation of the privilege of succession. Such privilege being a right created by the state.

Matter of Sherman, 153 N. Y. 1;
Matter of Penfold, 216 N. Y. 163;
Matter of Keeney, 194 N. Y. 281, aff'd *sub nom.* Keeney v. New York, 222 U. S. 525, *supra*;
Matter of Swift, 137 N. Y. 77;
Matter of White, 208 N. Y. 64.

In *Matter of Sherman* it was said, page 4:

"The tax imposed is not, in a proper sense, a tax upon the property passing by will, or under the Statutes of Descents or Distributions. It is a tax upon the right of transfer by will, or under the intestate law of the

state. Whether these laws are regarded as a limitation on the right of a testator to dispose of property by will or upon the right of devisees to take under a will, or the right of heirs or next of kin to succeed to the property of an estate, is not material. The so-called tax is an exaction made by the state in the regulation of the right of devolution of property of decedents, which is created by law, and which the law may restrain or regulate."

In *Matter of Penfold* it was said, pages 166-7:

"Neither the right to make a testamentary disposition or the right to inherit property is an inherent right. It is not guaranteed by the fundamental law. It depends entirely upon the consent of the legislature. It can withhold or grant the right, and if it grants it it may make its exercise and its extent subject to such burdens and requirements as it pleases."

The principle that the tax is on succession and not on property has been repeatedly recognized by this court.

In *Mager v. Grima*, 8 How. 490, 493-4, Mr. Chief Justice Taney said:

"* * * The law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. * * * And if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy."

In *Knowlton v. Moore*, 178 U. S. 41, 57, *supra*, Mr. Justice White said:

> "Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties."

In *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 288, *supra*, it was said:

> "They" (inheritance taxes) "are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it."

In *United States v. Perkins*, 163 U. S. 625, which construed the New York transfer tax law, it was said, page 628:

> "Thus the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee."

and, at page 629, it was also said:

> "That the tax is not a tax upon the property itself, but upon its transmission by will or by descent, is also held both in New York and in several other states, * * *."

In *Keeney v. New York*, 222 U. S. 525, page 534, *supra*, it was said:

"Wherever the amount of a tax is, as here, to be measured by the value of property, it has been earnestly argued that it was to tax the property itself, and that to ignore that feature is to put the name above the fact. But when the State decides to impose such a tax the amount must be determined by some standard. To require the same amount to be paid on all transfers is not so fair as to impose the burden in proportion to the value of the property. An excise on transfers therefore does not lose that character because the amount to be paid is determined by the values conveyed."

The power of a state to regulate the succession to property on the death of the owner gives it more extensive rights in the imposition of transfer taxes than it would have if it relied alone upon its taxing power.

This was brought out by Mr. Justice Stone, writing in *Stebbins v. Riley*, 268 U. S. 137, 140-1, where he said:

"• • • it has been repeatedly held by this Court that the power of testamentary disposition and the privilege of inheritance are subject to state taxation and state regulation and that regulatory taxing provisions, even though they produce inequalities in taxation, do not effect an unconstitutional taking of property, unless, as was said in *Dane v. Jackson*, 256 U. S. 589, 599, the taxing statute 'results in such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation—"to spoliation under the guise of exerting the power of taxing."' "

And, at pages 141-2, he said:

"Even assuming that a State does not, under the Constitution of the United States, possess unlimited

power to curtail the power of disposition of property at death or the privilege of receiving it by way of inheritance, there is nevertheless no constitutional guaranty of equality of taxation. The power of the States to discriminate in fixing the amount and incidence of taxation upon inheritances is undoubted. * * *

"The guaranty of the Fourteenth Amendment of the equal protection of the laws is not a guaranty of equality of operation or application of state legislation upon all citizens of a State."

Taxation pursuant to the power to regulate succession to property is similar to taxation imposed by a state for the privilege enjoyed by its corporations in exercising their corporate franchises or to the power which a state has in imposing taxes upon foreign corporations as a condition of their being permitted to do business within the state.

This principle is established in *Plummer v. Coler*, 178 U. S. 115. At page 137 it was said:

"* * * we may regard it as established that the relation of the individual citizen and resident to the State is such that his right, as the owner of property, to direct its descent by will, or by permitting its descent to be regulated by the statute, and his right, as legatee, devisee or heir, to receive the property of his testator or ancestor, are rights derived from and regulated by the State, and we are unable to perceive any sound distinction that can be drawn between the power of the State in imposing taxes upon franchises of corporations, composed of individual persons, and in imposing taxes upon the right or privilege of individuals to avail themselves of the right to grant and to

receive property under the statutes regulating the descent of the property of decedents."

The broad extent of the power of the state in taxing corporate franchises granted by it is illustrated by the decision in *Horn Silver Mining Co. v. New York*, 143 U. S. 305, 313, where it was said:

"The granting of the rights and privileges which constitute the franchises of a corporation being a matter resting entirely within the control of the legislature, to be exercised in its good pleasure, it may be accompanied with any such conditions as the legislature may deem most suitable to the public interests and policy. It may impose as a condition of the grant, as well as, also, of its continued exercise, the payment of a specific sum to the State each year, or a portion of the profits or gross receipts of the corporation, and may prescribe such mode in which the sum shall be ascertained as may be deemed convenient and just. There is no constitutional inhibition against the legislature adopting any mode to arrive at the sum which it will exact as a condition of the creation of the corporation or of its continued existence."

In the exercise of its taxing power and its power to regulate the succession to property a state may measure a transfer tax in any way that is not unreasonable or arbitrary. The state of New York is not confined to a measurement based solely upon the value of the property transferred as of the time of the transfer, but it is quite competent for it to measure the tax on contingent transfers on the basis of the full, undiminished value of the property transferred as of the time of the transfer, particularly when, as has been shown, the use of the tax is not actu-

ally received by the state until the contingencies happen. The tax is specific, not *ad valorem*. (Union Trust Co. v. Probate Judge, 125 Mich. 487.)

> "* * * the Fourteenth Amendment does not deprive a State of the power to regulate and burden the right to inherit, but at the most can only be held to restrain such an exercise of power as would exclude the conception of judgment and discretion, and which would be so obviously arbitrary and unreasonable as to be beyond the pale of governmental authority."
>
> *Campbell v. California*, 200 U. S. 87, 95.

A leading case upon this point is *Bell's Gap R. R. Co. v. Pennsylvania*, 134 U. S. 232, where, at page 237, the court say:

> "The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, *and those of like character, so long as they proceed within reasonable limits and general usage*, are within the discretion of the state legislature, or the people of the State in framing their Constitution." (Italics ours.)

Indeed, it has been said that no constitutional objection lies in the way of a legislative body prescribing any method of measurement to determine the amount it will charge for the privileges it bestows.

Home Insurance Co. v. New York, 134 U. S. 594, 600.

The following are examples of methods of measuring taxes which have been sustained by this court:

In *The Delaware Railroad Tax* case, 18 Wall. 206, a tax was imposed by the state of Delaware of one-fourth of one per cent upon the actual cash value of every share of the capital stock of the railroad company, with provision that if the line of the railroad lay partly in Delaware and partly in another state or states the company should only be required to pay the tax on such number of the shares of its capital stock as would be in that proportion to the whole number of shares which the length of the road within the limits of the state should bear to the whole length of the road. It was stated that this provided for a greater amount of tax than would have resulted if the apportionment had been made on the basis of the value of the property within and without the state. The court recognized that if the tax were upon the property of the railroad there would be great difficulty in sustaining it, but held that the tax was not upon the property of the railroad but "upon the corporation itself, measured by a percentage upon the cash value of a certain proportional part of the shares of its capital stock; a rule which, though an arbitrary one, is approximately just, at any rate is one which the legislature of Delaware was at liberty to adopt." (p. 231.)

The court further said (p. 231):

"The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

A tax measured by nominal or face value of corporate securities instead of actual value was sustained in *Bell's Gap R. R. Co. v. Pennsylvania*, 134 U. S. 232, *supra*, and also in *Chester City v. Pennsylvania*, 134 U. S. 240.

A tax so measured was sustained in *Hatch v. Reardon*, 204 U. S. 152, although in one instance the actual value was $30.75 per share of $100.00 face value and in another instance $172.00 per share of $100.00 face value.

A privilege tax on corporations may be measured by income from property although a direct tax on such property would be prohibited.

Flint v. Stone Tracy Co., 220 U. S. 107.

See also

Home Insurance Co. v. New York, 134 U. S. 594;

Society for Savings v. Coite, 6 Wall. 594;

Provident Institution v. Massachusetts, 6 Wall. 611.

An excise tax may be imposed upon a foreign corporation measured by its entire capital stock, even though the corporation is engaged in interstate as well as intrastate commerce, if such tax does not burden the interstate commerce and is levied upon a legitimate subject of state taxation.

Baltic Mining Co. v. Massachusetts, 231 U. S. 68.

In *Roberts & Schaefer Co. v. Emmerson*, 271 U. S. 50, it was held that the state of Illinois might impose a franchise tax on domestic corporations measured by the par value of shares having par value or in the case of no par value shares on the basis of $100 per share, and in so doing did not violate the provisions of the fourteenth amendment to the constitution of the United States, for the reason that no par value shares may reasonably be classified differently from par value shares even though, concededly, all shares without par value were not of the value of $100, or of the same value, inasmuch as the statute permitted no par value shares to be issued for money or property of not less than five dollars nor more than one hundred dollars per share.

In *Bass, Ratcliff & Gretton, Limited v. State Tax Commission*, 266 U. S. 271, a franchise tax imposed upon a foreign corporation for the privilege of doing business in the state of New York was held not to violate the due process clause of the fourteenth amendment to the constitution of the United States by reason of the fact that in measuring the tax the amount of net income of the corporation to be used as the base was determined by the allocation to the state of so much of the entire net income of the corporation from business carried on both within and without the state as the value of its real property, tangible personal

property, bills and accounts receivable and shares of stock of other corporations within the state bore to the aggregate value of the corporation's real property, tangible personal property, bills and accounts receivable and shares of stock of other corporations.

A tax upon railroads at the average rate of taxation imposed on all of the property within the state subject to *ad valorem* taxes is not unconstitutional.

Michigan Central Railroad Co. v. Powers, 201 U. S. 245, *supra*.

A law of the state of New Jersey provided for an inheritance tax graduated as to rate according to the value of the entire estate and required that where the estate included property both within and without the state, the tax should be computed as if all of the property were within the state and so much of the tax so computed should be payable to the state as the value of the property of the estate within the state should bear to the entire value of the property of the estate within and without the state. This method of measuring the tax was sustained in *Maxwell v. Bugbee*, 250 U. S. 525.

The tax approved in *Maxwell v. Bugbee*, was discussed by the New Jersey Court of Errors and Appeals in *Carr v. Edwards*, 84 N. J. L. 667, 669, in the following language:

> "It is true that the tax is not necessarily five per cent upon the whole New Jersey succession. The amount depends on the ratio of the New Jersey property to the entire estate wherever situated. This, however, merely affords a measure of the tax imposed; the tax is still by the very words of the section imposed upon the property located within this state."

See also:

Maine v. Grand Trunk Railway Co., 142 U. S. 217;

Wisconsin & Michigan Ry. Co. v. Powers, 191 U. S. 379;

Gorham Mfg. Co. v. Travis, 274 F. 975, aff'd *sub nom. Gorham Mfg. Co. v. Tax Comm.*, 266 U. S. 265;

New York State v. Roberts, 171 U. S. 658.

It may be observed that the basis for the measurement of the tax prescribed by the statute under examination is much more reasonable than that employed in the *Maxwell v. Bugbee* case. There, in practical effect, it would seem that the basis of measurement was such that a tax was imposed upon property over which the state of New Jersey had no jurisdiction because it was situated beyond its borders. Concededly, the New Jersey case is on the border line, but if the tax there imposed was consistent with the constitution of the United States, particularly the fourteenth amendment thereto, surely it would seem that the method of measurement employed by the state of New York in imposing its tax is beyond question constitutional.

We think that if the state of New York should have seen fit to place contingent transfers in a class by themselves and to enact that a tax should be imposed thereon at the highest possible rate under any contingency, such tax being made payable as of the date of the decedent's death and without possibility of adjustment or refund, such a law, although open to question on grounds of equity and fairness, could not be successfully attacked as denying due process of law or equal protection of the laws. However, we are not confronted with such a law but with one which is entirely fair and equitable and which gives every evidence that the legislature in adjusting the state's system

of taxation has gone to great length in its endeavor to equalize the burden and do justice to all concerned.

Plaintiffs-in-error contend that the same portion of decedent's estate is taxed twice and that the aggregate value of the shares of the beneficiaries is arbitrarily fixed at a sum in excess of the value of the whole estate, resulting in a purely fictitious item of tax. Manifestly, these contentions are incorrect. No portion of the estate is taxed more than once. The life estate is taxed and the remainder is taxed. The tax upon the life estate is measured by its value computed as of the date of the transfer, whereas the tax upon the remainder is measured in a different manner but nevertheless it is only the remainder which is taxed.

If the argument of the plaintiffs-in-error is correct the statutes of those states which tax remainders on the basis of the value of the property transferred as of the date of vesting in possession or enjoyment without deduction for or on account of any intervening estate or interest are also subject to condemnation, for under those statutes substantially the same result is obtained as under the New York law.

Several states impose a tax on the full, undiminished value of all remainders as of the date of vesting and one (Kansas) applies this method only in the case of contingent remainders, classifying the same separately from vested remainders as does New York.

See:

Tax Code of Virginia, section 106;

Pennsylvania Act of June 20, 1919, P. L. 521, section 3;

Massachusetts General Laws, ch. 65, sections 13, 14;

General Statutes of Kansas, sections 79-1505.

The power of a state to impose a transfer tax to attach at some other time than the instant of death is settled. The time when the tax shall attach is within the discretion of the state legislature.

An absolute and irrevocable transfer *inter vivos*, but intended to take effect in possession or enjoyment at or after the transferor's death, may be taxed as of the date of the transferor's death instead of the date of the execution of the deed of transfer.

Keeney v. New York, 222 U. S. 525, *supra*.

In the *Keeney* case it was said (p. 537):

> "But the statute does not impose a tax on the property, but on the transfer. The validity of that burden must be determined by the situation as it existed in 1903, when the deed was made. At that time the grantor was a resident of the State of New York. This personal property there had its situs. She there made a transfer, which was taxable, regardless of the residence of the trustee or beneficiary. The fact that the assessment and payment were postponed until the death of the grantor would be a benefit to the remainderman in the many instances in which values decreased. But where the power to tax exists, it is for the State to fix the rate *and to say when and how the amount shall be ascertained and paid*. The fact that the liability was imposed when the transfer was made in 1903, and that payment was not required until the death of grantor in 1907, does not present any Federal question." (Italics ours.)

A transfer tax may be imposed at the time when a contingent remainder vests. It was so held by this court in *Cahen v. Brewster*, 203 U. S. 543. In that case, at page 550, this court say:

"The tax was defined in the *Perkins case* to be 'not a tax upon the property itself, but upon its transmission by will or descent'; and in the *Magoun case*, 'not one on property, but one on the succession'. In *Knowlton v. Moore* it was said that such taxes 'rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested'. But these definitions were intended only to distinguish the tax from one on property, and it was not intended to be decided that the tax must attach at the instant of the death of a testator or intestate. In other words, we defined the nature of the tax; we did not prescribe the time of its imposition. To have done the latter would have been to prescribe a rule of succession of estates and usurp a power we did not and do not possess. There is nothing, therefore, in those cases which restrains the power of the State as to the time of the imposition of the tax. It may select the moment of death, or it may exercise its power during any of the time it holds the property from the legatee. 'It is not', we said in the *Perkins case*, 'until it has yielded its contribution to the State that it becomes the property of the legatee'."

Applying the reasoning of the foregoing quotation to the situation in the state of New York with respect to the taxation of contingent transfers, we find that the state in the exercise of its power to regulate succession to property on the death of the owner has, in effect, enacted that the tax on contingent transfers shall be payable when the same vest in possession and enjoyment and that pending the

vesting thereof, a portion of the property of the decedent's estate sufficient to insure payment of the largest amount of tax that may eventually be found due shall be impounded and held until the estate has yielded its contribution to the state. It is submitted that there cannot be doubt as to the power of the state to regulate the succession in this manner.

In *Moors v. Treasurer and Receiver General*, 237 Mass. 254, the supreme judicial court of Massachusetts sustained a law which taxed remainders at the time they vested on the basis of the then value of the property. A remainder valued at $475,000 at the time of a decedent's death was taxed at a value of $547,040, its value at the time it fell in.

If a state may impose a death tax on property conveyed by an irrevocable deed *inter vivos* intended to take effect at death on the basis of the value of the property transferred at the time of the transferor's death, and may tax remainders on the basis of their value when they fall in, without deduction for or on account of intervening estates or interests, or may tax the exercise of a power of appointment on the basis of the value of the property at the time of such exercise (Orr v. Gilman, 183 U. S. 278) even though the succession is from the donor and not the donee of the power, we see no reason why the state of New York may not tax contingent transfers at the time they vest in possession or enjoyment on the basis of the full, undiminished value of the property transferred as of the time of the decedent's death, without deduction for or on account of any intervening estate or interest. It is probable that in most cases this method will result in a lesser tax than would be imposed if the value were taken as of the time of vesting in possession and enjoyment. Certainly

in very few cases would it result in a greater tax. In any event, the statute does not produce a result which places it in conflict with the fourteenth amendment to the constitution of the United States.

Absolute equality and uniformity in the operation of a taxing statute is not required. In fact, it is impossible of attainment. The constitutional guarantees of equal protection of the laws and of due process are not to be invoked unless the inequalities and lack of uniformity are so gross as to amount to an arbitrary taking of property in violation of the inherent rights of the taxpayer.

Board of Education v. Illinois, 203 U. S. 553, *supra;*
Billings v. Illinois, 188 U. S. 97, *supra;*
Cahen v. Brewster, 203 U. S. 543, *supra.*

It was said in *Beers v. Glynn*, 211 U. S. 477, 485, *supra:*

> "Indeed, it may be laid down as a general rule that mere inequalities or exemptions in the matter of state taxation are not forbidden by the Federal Constitution."

It must always be remembered that a testator is not obliged to create a contingent remainder and if he does not fancy the law under which such remainders are taxed, he may readily relieve himself from the effect of it by failing to create them.

In *New York Trust Company v. Eisner*, 256 U. S. 345, this court was discussing the claim that the federal estate tax law of 1916 would produce inequalities affecting legatees and said (p. 349):

"As to the inequalities in case of a will they must be taken to be contemplated by the testator. He knows the law and the consequences of the disposition that he makes."

The court will consult the convenience of the taxing power in determining the validity of a taxing act (*Hatch v. Reardon*, 204 U. S. 152, *supra*) and will not interfere with a method of taxation which has been developed as the one most suited to the state's system of taxation, as is the case with respect to the New York law.

As was said in *King v. Mullins*, 171 U. S. 404, 436:

"The judiciary should be very reluctant to interfere with the taxing systems of a State, and should never do so unless that which the State attempts to do is in palpable violation of the constitutional rights of the owners of property."

See also

Florida Central &c. R'd Co. v. Reynolds, 183 U. S. 471.

In discussing the claim that a tax was an arbitrary discrimination, Mr. Justice Holmes in *Hatch v. Reardon*, 204 U. S. 152, 158, *supra*, said:

"This objection to a tax must be approached with the greatest caution."

In *Michigan Central Railroad Co. v. Powers*, 201 U. S. 245, 292-3, it was said:

"There is no general supervision on the part of the Nation over state taxation, and in respect to the latter the State has, speaking generally, the freedom of a sovereign, both as to objects and methods."

And Mr. Justice Holmes in *Wheeler v. Sohmer*, 233 U. S. 434, 439, said:

> "The necessity of caution in cutting down the power of taxation on the strength of the Fourteenth Amendment often has been adverted to."

In speaking of the fourteenth amendment in *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, *supra*, at page 293, the court say:

> "* * * it may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the State a wide latitude as far as interference by this court is concerned."

In *Orr v. Gilman*, 183 U. S. 278, 283, *supra*, this court say:

> "This court has no authority to revise the statutes of New York upon any grounds of justice, policy, or consistency to its own constitution. Such questions are concluded by the decision of the legislative and judicial authorities of the State."

The New York act of 1925 in no way infringes the fourteenth amendment. The tax operates alike on all persons and property similarly situated and the assessment is made by a judicial officer after notice and an opportunity to be heard. There is a presumption of constitutionality surrounding taxing laws which is stronger than that which applies to other laws and which this court will invoke if necessary to sustain the act.

In *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 615, it was said:

> "As an act of Congress should not be declared unconstitutional unless its repugnancy to the supreme

law of the land is too clear to admit of dispute, so a local regulation under which taxes are imposed should not be held by the courts of the Union to be inconsistent with the National Constitution unless that conclusion be unavoidable. All doubt as to the validity of legislative enactments must be resolved, if possible, in favor of the binding force of such enactments."

See also

San Diego Land and Town Company v. National City, 174 U. S. 739.

The clause of the fourteenth amendment to the constitution of the United States which prohibits a state denying to any citizen the equal protection of the law "only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances."

Kentucky Railroad Tax Cases, 115 U. S. 321, 337.

We think this court might well decide this case by using the same language which it employed in *Orr v. Gilman*, 183 U. S. 278, *supra*, at 287, when it said:

"In the light of the principles thus established we are unable to see in this legislation of the State of New York, as construed by its highest court, any infringement of the salutary provisions of the Fourteenth Amendment. There are involved no arbitrary or unequal regulations, prescribing different rates of taxation on property or persons in the same condition. The provisions of the law extend alike to all estates that descend or devolve upon the death of those who once owned them. The moneys raised by the taxation

> are applied to the lawful uses of the State, in which the legatees have the same interests with the other citizens. Nor is it claimed that the amount or rate of the taxation is excessive to the extent of confiscation."

No better illustration of the equality of the tax on contingent transfers could be found than is exhibited by the first table on page 28 of the brief of plaintiffs-in-error, which shows four cases in each of which the value of the property transferred is $500,000, but in each case the age of the life tenant is different, resulting in different valuations for the remainders, if ascertained as of the date of the transfer by deducting the values of the life estates. If the effect of the law was to impose a tax on these remainders as of the date of the decedent's death, there might be cause for complaint of inequality. The fact is that the tax is not imposed until the remainders fall in. Then each of the remaindermen will receive $500,000, and the tax on the amount which each will receive will be $16,750. Absolute equality is the result.

In the second table on page 28 of the brief of plaintiffs-in-error it is shown that the total tax on the life estates and remainders referred to in the first table will vary. This is true, but the cause for the variation is not found in the taxation of the remainders. It is due to the different valuations of the life estates, concerning which no question is presented here.

The valuation of life estates by the use of mortality tables produces flagrant inequalities, and necessarily so, because mortality tables represent averages involving many thousands of lives, producing results which rarely, if ever, fit the individual case. There would be much bet-

ter reason for attacking a law requiring that life estates be valued on the basis of mortality tables than exists for attack upon the law of New York taxing contingent transfers. Nevertheless, the courts have repeatedly sustained the valuation of life estates according to mortality tables.

In *Simpson v. United States*, 252 U. S. 547, 550, it was said:

> "Of the two claims of error argued, the first is, that the Court of Claims erred in refusing to hold that it was illegal to use mortuary tables * * *.
>
> "The objection is not to the particular table that was used but to the use of any such table at all—to the method. Such tables, indeed the precise table which was made the basis of the one used by the collector, had been resorted to for many years prior to 1899 by courts, legislatures and insurance companies for the purpose of determining the present value of future contingent interests in property * * *. Both the method and the rate adopted in this case have been assumed by this court, without discussion, as proper in computing the amount of taxes to be collected under this War Revenue Act in *Knowlton v. Moore*, 178 U. S. 41, 44; *United States v. Fidelity Trust Co.*, 222 U. S. 158; *Rand v. United States*, 249 U. S. 503, 506, and in *Henry v. United States*, 251 U. S. 393. It is much too late to successfully assail a method so generally applied, and as to this claim of error the judgment of the Court of Claims is affirmed."

See also

Matter of White, 208 N. Y. 64, *supra*.

It is suggested in the brief of plaintiffs-in-error, at pages 10 and 12, that the New York transfer tax is similar

in nature to the federal estate tax, which has been defined as one upon the transfer of his net estate by a decedent. The New York transfer tax is not an estate tax, but an inheritance or share tax. It is not assessed against the estate as a whole but is assessed against the share of each beneficiary. The distinction is brought out in *Knowlton v. Moore*, 178 U. S. 41, *supra*, 66, where it was said:

> "One of two things must arise. When the rate of tax is thus calculated upon the particular attitude to the deceased of each of the legatees or distributees, the sum of the tax must be deducted either from each particular legacy or from the mass of the whole personal estate. If it is deducted from each particular legacy, then it is manifest that the tax imposed will have been levied, not upon the mass of the estate, but upon each particular legatee or beneficiary, since the share of such person will have paid a rate of taxation predicated upon the amount of the legacy and the relationship, or want of relationship, of the particular recipient thereof to the deceased. This being the case, no room would be left for the contention that the tax was imposed on the whole estate. On the other hand, if the whole sum of the taxation on all the shares, calculated on the basis of the relationship of each beneficiary and the amount received, be deducted from the mass of the estate, then, each recipient would pay only a proportion of the amount without reference to his relationship to the deceased. This would result in imposing the tax on the whole personal estate, and ratably distribute the burden among all the beneficiaries. But to reach this the entire classification, grading the rate of the tax by the degrees of relationship, would have to be disregarded."

The New York cases cited by plaintiffs-in-error on page 10 of their brief to show that the tax is upon the clear market value of the property at the time of death were decided before the enactment of chapter 144 of the laws of 1925, and merely stated the law existing when they were decided. They were all cited by plaintiffs-in-errors in their brief in the court of appeals. As the law now stands, the tax is the same as it was when the cases referred to were decided, with the exception that contingent transfers have been classified separately and are taxed in a different manner.

Defendants-in-error contend that the New York transfer tax as applied to contingent transfers is a practical method of taxation adapted to the requirements and the tax system of the state of New York and in full accord with the policy of that state. The law is not arbitrary, capricious, oppressive, discriminatory or inconsistent with natural justice. It does not produce gross inequality or confiscation. The basis of classification is entirely reasonable and proper. Viewed from the standpoint of its actual application, it imposes no hardship except in the sense that all taxation may be regarded as imposing hardship.

In the words of this court in *Nicol v. Ames*, 173 U. S. 509, at page 516,

> "Taxation is eminently practical, and is in fact brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy."

We may sum up the argument of defendants-in-error in the words of Mr. Justice Clarke in *Dane v. Jackson*, 256 U. S. 589, 601:

> "The case presented is clearly not one of that extreme inequality in taxation of which the Federal courts should lay hold, but involves rather a question of state policy, of a character which the people have been satisfied to leave to the judgment, patriotism and sense of justice of representatives in their state legislature."

POINT III.

The judgment of the Court below should be affirmed.

Respectfully submitted,

SETH T. COLE,
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Appendix "A."

The following are the provisions of New York laws of 1925, ch. 144, except that for convenience matter deleted from the transfer tax law by such chapter is also shown. New matter added by that chapter is italicized and matter which was deleted is enclosed in brackets.

Section 1. Section two hundred and thirty of chapter sixty-two of the laws of nineteen hundred and nine, entitled "An act in relation to taxation, constituting chapter sixty of the consolidated laws," as last amended by chapter

six hundred and fifty-seven of the laws of nineteen hundred and twenty-four, is hereby amended to read as follows:

§230. *Proceedings by appraiser.* In each county in which the office of appraiser is not salaried the county treasurer shall act as appraiser. The surrogate, either upon his own motion, or upon the application of any interested person, including the tax commission, shall by order direct the person or one of the persons appointed pursuant to section two hundred and twenty-nine of this chapter in counties in which the office of appraiser is salaried, and in other counties, the county treasurer, to fix the fair market value of property of persons whose estates shall be subject to the payment of any tax imposed by this article.

Every such appraiser shall forthwith give notice by mail to all persons known to have a claim or interest in the property to be appraised, including the tax commission, and to such persons as the surrogate may by order direct, of the time and place when he will appraise such property. He shall at such time and place appraise the same at its fair market value as herein prescribed; and for that purpose the said appraiser is authorized to issue subpoenas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath concerning such property and the value thereof; and he shall make report thereof and of such value in writing, to the said surrogate, together with the depositions of the witnesses examined, and such other facts in relation thereto and to said matter as the surrogate may order or require. Every appraiser, except in the counties in which the office of appraiser is salaried, for which provision is hereinbefore made, shall be paid his actual and necessary traveling expenses and the fees paid such witnesses, which fees shall

be the same as those now paid to witnesses subpoenaed to attend in courts of record, payment to be made out of moneys appropriated for such purpose. No deduction shall be allowed from the appraised value of the property transferred on account of any liability of decedent incurred or assumed by the acquisition, care, improvement, use, enjoyment or disposition of property without the state, the transfer of which is not subject to tax under the provisions of this article. Any transfer of his property made by a decedent by deed, sale or gift within two years prior to his death, without a valid and adequate consideration therefor, shall be presumed to have been made in contemplation of death within the meaning of this chapter.

The value of every future or limited estate, income, interest or annuity for any life or lives in being, shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be five per centum per annum.

In estimating the value of any estate or interest in property, to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled thereto, no allowance shall be made on account of any contingent incumbrance thereon, nor on account of any contingency upon the happening of which the estate or property or some part thereof or interest therein might be abridged, defeated or diminished; provided, however, that in the event of such incumbrance taking effect as an actual burden upon the interest of the beneficiary, or in the event of the abridgement, defeat or diminution of said estate or property or

interest therein as aforesaid, a return shall be made to the person properly entitled thereto of a proportionate amount of such tax on account of the encumbrance when taking effect, or so much as will reduce the same to the amount which would have been assessed on account of the actual duration or extent of the estate or interest enjoyed. Such return of tax shall be made in the manner provided by section two hundred and twenty-five of this chapter.

Where any property shall, after the passage of this chapter, be transferred subject to any charge, estate or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase accruing to any person or corporation upon the extinction or determination of such charge, estate or interest, shall be deemed a transfer of property taxable under the provisions of this article in the same manner as though the person or corporation beneficially entitled thereto had then acquired such increase from the person from whom the title to their respective estates or interest is derived.

When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, *which tax shall be computed on the full, undiminished value of such property at the time of the transfer without deduction for or on account of any intervening estate or interest*, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property

transferred, and the surrogate shall enter a temporary order determining the amount of said tax in accordance with this provision; provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this article, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article, *computed upon the full, undiminished value of the property as aforesaid;* and the executor or trustee of each estate, or the legal representative having charge of the trust fund, shall immediately upon the happening of said contingencies or conditions apply to the surrogate of the proper county, upon a verified petition setting forth all the facts, and giving at least ten days' notice by mail to all interested persons or corporations, for an order modifying the temporary taxing order of said surrogate so as to provide for the final assessment and determination of the tax in accordance with the ultimate transfer or devolution of said property. [Such return of overpayment shall be made in the manner provided by section two hundred and twenty-five of this chapter.] *If application for modification of the temporary taxing order is not made within six months after the happening of any contingency or condition the tax as finally fixed and determined shall bear interest at the rate of six per centum per annum from the date when such contingency or condition happened to the date of the entry of the modifying order, which interest shall be in addition to the interest imposed by section two hundred and twenty-three of this article for non-payment of the tax at the highest possible rate within*

eighteen months from the date of the transfer. Whenever a tax on a transfer dependent on a contingency or condition has been determined at the highest rate in the manner prescribed by the foregoing provisions [,] *and the personal property included in the transfer is less than the amount of said tax*, the executors or trustees, in lieu of paying the [total] amount so determined, may elect to file in the office of the [surrogate] *tax commission* a bond to the people of the state, approved as to form and amount by the [surrogate] *tax commission*, for the purpose of securing the payment of the [difference between the] tax on such transfer [,] [at the highest rate and the tax on such transfer which would be due if the contingency or condition had happened at the date of the appraisal of such estate and to pay in cash the balance of such tax as so determined; and it shall be the duty of the executor or trustee of each estate, or the legal representative having charge of the trust fund, upon the happening of such contingency or condition, to apply forthwith to the Surrogate for an order fixing the tax on such transfer in accordance with the ultimate devolution thereof]. The [Surrogate] *tax commission* at any time may [make an order increasing or decreasing] *increase or decrease* the amount of such bond as [justice] *conditions* may require.

Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited.

Where an estate for life or for years can be divested by the act or omission of the legatee or devisee it shall be taxed as if there were no possibility of such divesting.

The report of the appraiser shall be made in duplicate, one of which duplicates shall be filed in the office of the surrogate and the other in the office of the tax commission.

§2. Section two hundred and forty-one of such chapter as last amended by chapter four hundred and seventy-six of the laws of nineteen hundred and twenty-one, is hereby amended to read as follows:

§241. *Disposition of revenues; tax on contingent remainders; refunds in certain cases.* The tax commission shall deposit all taxes collected by it under this article, except as hereinafter otherwise provided, in a responsible bank, banking house or trust company in the city of Albany, which shall pay the highest rate of interest to the state for such deposit, to the credit of the state comptroller on account of the transfer tax. And every such bank, banking house or trust company shall execute and file in his office an undertaking to the state, in the sum, and with such sureties, as are required and approved by the comptroller, for the safe keeping and prompt payment on legal demand therefor of all such moneys held by or on deposit in such bank, banking house or trust company, with interest thereon on daily balances at such rate as the comptroller may fix. Every such undertaking shall have indorsed thereon, or annexed thereto, the approval of the attorney-general as to its form. The tax commission shall on the first day of each month make a verified return to the state treasurer of all taxes received by it under this article, stating for what estate, and by whom and when paid; and shall credit itself with all expenditures made since its last previous return on account of such taxes, for refunds lawfully charge-

able thereto. The comptroller shall on or before the tenth day of each month pay to the state treasurer the balance of such taxes remaining in his hands at the close of business on the last day of the previous month.

Whenever the tax on a contingent remainder has been determined at the highest rate which on the happening of any of said contingencies or conditions would be possible under the provisions of this article, the tax commission, in the counties wherein this tax is payable direct to it, and in all other counties the treasurer of said counties, respectively, when such tax is paid shall retain and hold to the credit of said estate [so much of] the tax assessed upon such contingent remainders [as represents the difference between the tax at the highest rate and the tax upon such remainders which would be due if the contingencies or conditions had happened at the date of the appraisal of said estate], and the tax commission or the county treasurer shall deposit the amount of tax so retained in some solvent trust company or trust companies or savings banks in this state designated by the state comptroller, to the credit of the state comptroller on account of such estate, paying the interest thereon when collected by him to the executor or trustee of said estate, to be applied by said executor or trustee as provided by the decedent's will. Upon the happening of the contingencies or conditions whereby the remainder ultimately vests in possession, if the remainder then passes to persons taxable at the highest rate, the state comptroller on the certificate of the tax commission, shall turn over the amount so retained to the state treasurer as provided herein and by section two hundred and forty of this chapter, or if the remainder ultimately vests in persons taxable at a lower rate or a person or corporation exempt from taxation by the provisions of this article, the state comptroller on the certificate of the tax commission

shall refund any excess of tax so held to the executor or trustee of the estate, to be disposed of by said executor or trustee as provided by the decedent's will. Executors or trustees of any estate may elect to assign to and deposit with the tax commission or the county treasurer, bonds or other securities of the estate approved by the tax commission [or the county treasurer], both as to the form of the collateral and the amount thereof, for the purpose of securing the payment of the [difference between the] tax on said remainder [at the highest rate and the tax upon said remainder which would be due if the contingencies or conditions had happened at the date of the appraisal of said estate, and cash for the balance of said tax as assessed], which said bonds or other securities shall be held by the tax commission, or the county treasurer to the credit of said estate until the actual vesting of said remainders, the income therefrom when received by the tax commission or the county treasurer to be paid over to the executor or trustee during the continuance of the trust estates [and then to be finally disposed of in accordance with the ultimate transfer or devolution of said remainders as hereinbefore provided; and it shall be the duty of the executors or trustees of such estates to forthwith notify the tax commission of the actual vesting of all such contingent remainders].

If any executor or trustee shall have deposited with the tax commission or the county treasurer, cash or securities, or both cash and securities, to an amount in excess of the sum necessary to pay the transfer tax upon such contingent remainders, [at the highest rate as aforesaid,] the excess of tax so deposited shall be returned to the executor or trustee, or if any executor or trustee shall have deposited with the tax commission, or the county treasurer, cash or securities, or both cash and securities, to an amount less

than is sufficient to pay the tax upon such contingent remainders as finally assessed and determined, the executor or trustee of said estate shall forthwith, upon the entry of the order determining the correct amount of tax due, pay to the tax commission, or the county treasurer, whichever is entitled under the provisions of this article to receive the tax, the balance due on account of said tax. *In case securities shall have been deposited and the tax upon such contingent remainders as finally assessed and determined shall be paid, the executor or trustee shall be entitled to the return of such securities; but if the tax is not paid within sixty days after the entry of the order finally assessing and determining the tax, the tax commission may sell the securities so deposited in the open market or at public auction, at its option, and apply the proceeds thereof to the payment of the tax.* If on account of the time or manner of payment of a tax under this article it be impossible to identify or separate the portion thereof paid on account of a contingent remainder pursuant to this section and the whole of such payment shall have been deposited in the state treasury, the portion of the tax on account of such contingent remainder to be held or deposited on account of the estate pursuant to this section shall be deemed a refund under this article, and shall be drawn, on the certificate of the tax commission and approval of the comptroller, from moneys deposited with the state comptroller and available for refunds under this article, and when so drawn shall be deposited to the credit of the state comptroller on account of the estate as provided by this section. Bonds or other securities to be deposited with the tax commission pursuant to this section shall be turned over by it to the state comptroller for safe keeping.

§3. This act shall take effect immediately.

Appendix "B."

MEMORANDUM.

In re Bill to Amend the Transfer Tax Law relative to the taxation of contingent remainders.

An explanation of the purposes of this bill makes it necessary to briefly trace the history of the taxation of contingent remainders under the transfer tax law.

Originally, the taxation of contingent remainders was suspended until the remainders fell in, at which time they were taxed on the full, undiminished value of the property transferred at the time it vested in possession and enjoyment and without deduction on account of the value of any intervening estate. It will be observed that this was substantially the equivalent of a tax on the remainders payable at the time of the transfer, computed on the value of the property less value of the intervening estate, for the tax so determined with interest would amount at the time the remainder fell in to the tax computed at that time on full, undiminished value.

Suspension of the taxation of contingent remainders led to much confusion and the state eventually lost considerable sums of tax by reason of inability to follow up the remainders. To remedy this condition the law was amended in 1899 to provide for the immediate taxation of contingent remainders at the time of the transfer at the highest possible rate, the tax being computed on the value of the property transferred with allowance for the value of the intervening estate, and as so computed was payable forthwith out of the property transferred. When the re-

mainder vested in possession and enjoyment, if it developed that an excess tax had been collected, such tax was returned with interest at 6% per annum from the time it was paid. The rate of interest was later reduced to 3% per annum. This method of taxation was sustained by the courts but in so doing the courts pointed out that it worked an injustice on the life tenant, for the reason that it deprived him of the income from a portion of the principal of the estate. To remedy this the law was changed to its present form and provides that the tax on a contingent remainder shall be determined at the highest possible rate and also at the rate which would be payable if the contingency had happened at the date of the appraisal. The tax at the low rate is immediately covered into the state treasury and the difference between the low and high rate is deposited to the credit of the estate pending the falling in of the remainder and while so held the income is paid to the executor or trustee for the benefit of the life tenant. In lieu of paying the difference between the low and high rate in cash the executor or trustee may deposit bonds or other securities to secure such amount and receive the income therefrom until the remainder vests. Provision is also made that instead of paying the difference between the low and high rate or depositing securities a bond may be given to secure the amount.

The present method of taxing contingent remainders is open to two objections; first, the life tenant is still deprived of the income on the amount which is taken and covered into the state treasury to pay the tax at the low rate and to that extent an injustice is being worked. Second, the value of the remainder is determined as of the time of the transfer by deducting from the value of the property transferred the value of the intervening estate,

whereas of the tax computed on the value thus determined the state does not receive the benefit of the difference between the low and high rate until the remainder vests. This works an indefensible discrimination against the vested remainder man in favor of the contingent remainder man. The vested remainder is taxed at the time of the transfer on the value of the property at that time less the value of the intervening estate, but the tax is payable at once by the remainder man and is covered into the state treasury, so that the state has the use of the money immediately. In the case of the contingent remainder the tax is computed by the same method of valuation as in the case of the vested remainder, but the state does not receive the use of the difference between the tax at the low and the high rate until the remainder vests. Under the 1899 act and the law prior thereto, when the remainder fell in the state received the equivalent of the tax on the value of the contingent remainder at the time of the transfer, less the value of the intervening estate, plus the use of the money from the time of the transfer, whereas under the present law a part of the tax on the contingent remainder is computed on the value of the property at the time of the transfer less the intervening estate, but the state loses the use of the money from the time of the transfer until the remainder falls in.

Perhaps the situation can be best explained by a concrete illustration: Assume that a man dies leaving a principal fund of $100,000, the life use of which is given to his widow with remainder to his son, if he be living at the time of the widow's death, or if the son does not survive the widow the remainder to go to a nephew. This creates a contingent remainder. The value of the widow's life estate is $25,000, which leaves $75,000 as the value of the

remainder at the time of the transfer. The taxing order under existing law will provide for a minimum tax on the remainder of $1,150, which would be the amount due in the event the remainder vests in the son, and it would also provide for a maximum tax of $4,250 which would be the amount in the event the remainder vests in the nephew. The tax of $1,150 is immediately payable but the difference of $3,100 may be provided for in one of three ways, i. e.,

(1) It may be paid in cash, whereupon the payment will be deposited and held until the remainder vests. If the remainder vests in the son the deposit will be refunded but if it vests in the nephew it will be applied to pay the tax. Until the remainder vests the interest on the deposit is paid to the executor or trustee for the benefit of the widow.

(2) In lieu of paying $3,100 in cash the executor or trustee may deposit bonds or other securities and receive the income therefrom until the time when the remainder vests.

(3) The executor or trustee may give a bond to insure the payment of the $3,100 if the remainder vests in the nephew.

Assuming that the remainder ultimately vests in the nephew, it will be noted that although the tax is computed on the value of the remainder at the time of the decedent's death and the value of the widow's life estate deducted, the state does not receive the use and benefit of the tax until after the widow's death. If instead of a contingent remainder the nephew had taken a vested remainder, the state would receive the same amount of tax but it would all be payable absolutely at the time of the decedent's death and from that time the state would have the use and benefit thereof. In the case of the contingent remainder vest-

ing in the nephew the state has lost the use of $3,100 from the date of the decedent's death to the date of the vesting of the remainder.

The bill corrects both of the defects in the law. It gives the life tenant the income from the entire estate and it taxes the remainder on the full value of the property transferred without deduction of the intervening estate. The use and benefit of this tax vests in the state when the remainder falls in and it is, therefore, the equivalent of the use and benefit of a tax on the value of the property, less the value of the intervening estate, payable at the time of the transfer. The discrimination between the vested remainder man and the contingent remainder man is removed. Adjustment of the tax is made when the remainder falls in if it then vests in a person taxable at less than the highest rate.

January 31, 1925.

NOV 27 1928

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 80.

NETTIE I. SIMONSON, ETTIE B. SIMONSON and FARMERS' LOAN AND TRUST COMPANY, etc.,
Plaintiffs-in-Error,

versus

STATE TAX COMMISSION OF NEW YORK,
Defendants-in-Error.

BRIEF FOR DEFENDANTS-IN-ERROR.

SETH T. COLE,
Counsel for Defendants-in-Error.

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BRIEF FOR DEFENDANTS-IN-ERROR.

There were no opinions below except in the Appellate Division, First Department, which is reported at 219 App. Div. 656. The case in the Court of Appeals is reported at 246 N. Y. 601.

POINT I.

The judgment of the Surrogates' Court entered on the remittitur of the Court of Appeals should be affirmed.

The questions raised in this case are the same as those in *Salomon, et al., etc. v. State Tax Commission of New*

York, No. 79 on the calendar of the October Term, 1928. The two cases are to be argued together. The brief for the State Tax Commission in the *Salomon* case fully sets forth its contentions and the arguments of said brief will not be here repeated but counsel for defendants-in-error desires to incorporate the arguments of said brief herein by reference with the same force and effect as if they were set out herein at length. Copies of the brief in the *Salomon* case have been furnished plaintiffs in error herein. Defendants-in-error believe that the decision in the *Salomon* case will necessarily be controlling in this case and that the arguments in its brief in that case constitute a full and complete answer to the points made by plaintiffs-in-error herein.

Only one observation will be made and that is in reference to the language of the New York Court of Appeals in *Matter of Terry*, 218 N. Y. 218, 223, quoted at page 10 of the brief of plaintiffs in error. This language, of course, applied to the facts in that case and was not intended to be a general statement applying to all cases under the transfer tax law of New York. It did not apply to the then existing provision for the taxation of contingent transfers on the basis of the full, undiminished value of the property transferred as of the time of the transfer, which the Court of Appeals had approved of in its opinion in *Matter of Seligmann*, 219 N. Y. 636. No more can it apply to the subsequent enactment of the Legislature of the State of New York by Chapter 144 of the Laws of 1925, which the Court of Appeals has sustained.

Respectfully submitted,

SETH T. COLE,
Counsel for Defendants-in-Error.

SUPREME COURT OF THE UNITED STATES.

Nos. 79 and 80.—October Term, 1928.

Leo Salomon et al., Plaintiffs in Error, 79 vs. State Tax Commission of New York.	In Error to the Surrogates' Court of New York County, State of New York.
Nettie I. Simonson et al., Plaintiffs in Error, 80 vs. State Tax Commission of New York.	

[February 18, 1929.]

Mr. Justice Brandeis delivered the opinion of the Court.

These cases, which were argued together, present the question whether the provision in the New York Transfer Law for taxing the transfer of contingent remainders violates the due process clause or the equal protection clause of the Fourteenth Amendment. That statute imposes a graduated succession tax. On the transfer of life estates and vested remainders the tax is measured by their respective values as of the testator's death and are payable then. The tax on the transfer of contingent remainders is not payable until the death of the life tenant; and it is measured by the value at the testator's death of the estate transferred, undiminished by the value of the intervening life estate. For the due payment of the deferred tax the executor must furnish adequate security. The amount of the security is fixed by a temporary taxing order. Laws of 1925, c. 144, Secs. 230 and 241.

It will be sufficient to state the facts and proceedings in the *Salomon* case. Meyer Hecht died in 1925 a resident of New York. He bequeathed his residuary estate in trust to his widow for life; and upon her death one equal share thereof to each child then living and to the then living issue *per stirpes* of each deceased child. The value of the residue as of the testator's death was appraised at $322,094.37. The then value of the widow's life estate therein, computed according to the standard mortality tables using five per

cent interest, was appraised at $124,957; the tax then payable was assessed thereon; and no objection is made thereto. If the future interests had been vested remainders, the tax thereon would have been payable then on an appraisal of $197,137.37; that is, on the difference between the then value of the residue and the then value of the life estate. The future interests were all contingent. The tax was not payable until the death of the life tenant. The temporary taxing order appraised their aggregate value at the widow's death as $322,094.37; that is, at the value of the residue undiminished by the value of the life estate. Security for the future payment of the tax was required to be given as the statute requires. An appeal from the appraisal was denied by the Surrogate of New York County. *Matter of Hecht*, 127 Misc. 211. His judgment was affirmed by the Appellate Division of the Supreme Court, 219 App. Div. 656. Its judgment was affirmed by the Court of Appeals, without opinion, 246 N. Y. 601, 602; and by the remittitur it became the judgment of the Surrogates' Court. That judgment is final within the meaning of § 237 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936. Compare *Wheeler* v. *Sohmer*, 233 U. S. 434; *Watson* v. *State Comptroller*, 254 U. S. 122. The constitutional claims were duly made below, and the case is properly here.

The need of a peculiar provision for taxing the transfer of contingent remainders arises from the fact that the New York law imposes a graduated tax. The rates differ according to the amount or value of the gift to the particular beneficiary and also according to his relationship to the decedent. The lowest rate payable by a lineal descendant is one per cent, the highest four per cent. The lowest rate payable by a stranger is five per cent, the highest eight per cent. As the remainders are contingent, it is impossible to know before the contingency happens in whom the remainders will vest; and it may be impossible to determine until then the relationship of the beneficiaries to the testator and the portions of the estate which they will respectively receive. Thus the rate of taxation will remain uncertain. For this reason, the statute postpones until the contingency happens both the definitive assessment of the tax on the transfer of the contingent remainders and the payment thereof. In respect to vested remainders, there is no obstacle to requiring both assessment and payment of this grad-

uated tax as of the testator's death. The amount of the tax can be determined then; because it is known who the vested remaindermen are, what the share of each is and what his relationship to the testator was. And the value of the remainders as of the testator's death is likewise known, being the difference between the then value of the property transferred and the computed value of the life estate.

The need of a special provision for the taxation in respect to contingent remainders and the reasonableness of the particular measure adopted in 1925 appear from the history of the legislation. Since the enactment of the Transfer Tax Law in 1885 (Ch. 483), the aim of the Legislature has been at all times to adopt a method of laying the tax which would be fair to both the life tenant and the future interest and would protect the revenues of the State. From time to time, various methods for doing this were tried. Experience revealed their defects. Under the original law and the early amendments, the transfers to contingent remaindermen were not taxable upon the testator's death, *Matter of Cager*, 111 N. Y. 343. They were taxable at the time when they vested in possession, *Matter of Stewart*, 131 N. Y. 274. And the tax then payable was computed upon the value, as of the testator's death, of the property transferred, less the value of the intervening life estate, *Matter of Sloane*, 154 N. Y. 109. Under this method the revenue derived from the tax on the contingent remainder was less than it would have been had the remainder been a vested one. For the State lost the benefit of the money during the period intervening between the death of the testator and that of the life tenant. To overcome this loss to the State and the discrimination thereby in favor of the contingent remaindermen, the Legislature provided by Chapter 284 of the Acts of 1897 that the tax payable on the vesting of the contingent remainder should be measured by the full value of the property as of the testator's death, without deducting the value of the intervening life estate, *Matter of Seligmann*, 219 N. Y. 656. This statute, while on its face eliminating the discrimination in favor of contingent remaindermen, was found to result in serious loss of revenue to the state. Taxes escaped collection when they became due, because it proved to be impossible to ascertain currently when the contingencies happened and hence when a tax became payable. To remedy this de-

fect, it was provided by Chapter 76 of the Laws of 1899, that the tax must be paid upon the testator's death; and that it should then be paid out of the corpus of the estate at the highest applicable rate, with a provision for paying to the remainderman the surplus with interest if it should prove that a lower rate was applicable. *Matter of Vanderbilt*, 172 N. Y. 69. This provision, while fully safeguarding the State's revenues, favored the remainderman at the expense of the life tenant. *Matter of Brez*, 172 N. Y. 689. For under this provision the life tenant lost the income on the full amount deducted to ensure payment of the tax on the contingent remainder; and the remainderman received from the State with interest such part thereof as proved not to be required for the ultimate payment of the tax. Thereupon some relief to the life tenant was afforded by Chapter 880 of the Laws of 1911. But it was not until the Act of 1925 here challenged provided for appraisal of the remainder as stated, that the Legislature succeeded in devising a means of laying the tax which operated justly as between life tenant and remaindermen and safeguarded the State's revenues.

First. The contention that the method of taxation prescribed violates the due process clause rests upon the assertion that in measuring the transfer tax in respect to a contingent remainder by the corpus of the trust fund undiminished by the value of the intervening life estate, something is taxed which does not exist. The argument is that taxation even of an inheritance must be measured by property taxable within the jurisdiction, *Frick* v. *Pennsylvania*, 268 U. S. 473, that New York levies the tax on the transfer of title from the testator, not on its value at the time of the transfer of possession, *Matter of Davis*, 149 N. Y. 539; that the tax must, therefore, be measured by what he transferred when he transferred it, that the aggregate value of the parts transferred by the testator cannot be greater than the value of the whole; but that here the State lays a tax upon both the value of the life interest and the undiminished value of the corpus.

The argument presented is unsound, because it ignores the fact that the tax in respect to the contingent remainders is not payable until after the death of the life tenant. The temporary taxing order, entered upon the testator's death, is made solely to ensure that the tax so deferred will be paid when ultimately assessed. The requirement may be satisfied by depositing with the State either ap-

proved securities or cash. In either event the income collected from the security prior to the time when the tax becomes payable is accounted for to the executor; and after the tax has been paid, the securities or cash remaining on deposit will be accounted for to him. By applying the applicable rate to the full value of that which comes into enjoyment and not exacting payment of the tax until then, a just result is sought. For the definitive assessment of the contingent remainder and the payment of the tax thereon are postponed to the same date. The due process clause places no restriction on a State as to the time at which an inheritance tax shall be levied or the property valued for purposes of such tax. Compare *Cahen* v. *Brewster*, 203 U. S. 543.

Second. It is claimed that the tax violates the equal protection clause. One contention is that it unjustifiably discriminates between contingent and vested remainders in that the value of the life estate is first deducted in assessing the latter. It is true that an exact equivalency is not always achieved, because the tax is graduated according to the value of the remainder. But since the payment of the tax is postponed until the termination of the life estate the present value of the tax will tend to approximate what it would have been, if vested remainders had been given to the same persons and in the same shares that eventually go to the contingent remaindermen—assuming, of course, that the same rate of interest is used in making the calculation of both the present value of the tax and the present value of the future estate. It is true, also, that there is not an exact equivalency, since life tenants do not die at the precise termination of their life expectancies. But this uncertainty underlies the taxation of all future interests, vested or contingent, wherever the tax is laid separately in respect to life estates and remainders. The uncertainty is unavoidable unless the State concludes to postpone laying the tax upon the remainders until they come into enjoyment, a course which it is not obliged to pursue. Moreover, there are differences between vested and contingent remainders which justify classification in imposing inheritance taxes. Compare *Stebbins* v. *Riley*, 268 U. S. 137, 141-143; *Billings* v. *Illinois*, 188 U. S. 97; *Board of Education* v. *Illinois*, 203 U. S. 553; *Beers* v. *Glynn*, 211 U. S. 477; *Keeney* v. *New York*, 222 U. S. 525.

Third. Several other reasons are urged why the statute should be held obnoxious to the equality clause. It is said that the tax being

graduated according to amounts, there will result from the use of mortality tables discrimination between members of the same class. It is urged that since the tax is not collected until the termination of the life estate a more perfect equality would be achieved by assessing the tax on the value of the remainder, after deducting the value of the life estate, and allowing interest to the State for the actual known period during which the tax was withheld. The fact that a better taxing system might be conceived does not render the law invalid. As was said in *Metropolis Theatre Co.* v. *Chicago*, 228 U. S. 61, 69-70, "To be able to find fault with a law is not to demonstrate its invalidity . . . . The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." Further, it is said that postponing payment of the tax will prove burdensome, because it involves giving security to ensure the deferred payment; and that where the security is given by the deposit of cash, the income earned thereon will probably be less than would have been earned if the money had been otherwise employed. To all such objections it may be answered that minor inequalities and hardships are incidents of every system of taxation and do not render the legislation obnoxious to the Federal Constitution.[1] *General American Tank Car Corp.* v. *Day*, 270 U. S. 367.

Whether the State's power to tax the privilege of taking by will or descent property within its jurisdiction is in any way limited by the Fourteenth Amendment has not been argued. As we are of opinion that none of the objections urged can be sustained, we have no occasion to consider that question. Compare *Stebbins* v. *Riley*, 268 U. S. 137, 140.

Affirmed.

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[1]See, also, State Railroad Tax Cases, 92 U. S. 575, 612; Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232; Merchants' Bank v. Pennsylvania, 167 U. S. 461, 464; Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283; Travellers' Insurance Co. v. Connecticut, 185 U. S. 364; Beers v. Glynn, 211 U. S. 477, 485; Citizens' Telephone Co. v. Fuller, 229 U. S. 322, 331; Northwestern Life Insurance Co. v. Wisconsin, 247 U. S. 132, 137, 141; Maxwell v. Bugbee, 250 U. S. 525, 543; Southern Ry. Co. v. Watts, 260 U. S. 519, 526.